Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: October 24, 2011

TO: Councilmember Marti Emerald

FROM: City Attorney

SUBJECT: Potential Prohibition of Smoking in Multi-Family Properties

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This memorandum is in response to an inquiry from your office regarding a draft ordinance submitted to the Public Safety and Neighborhood Services Committee by the San Diego Nonsmoking Housing Task Force. Although the draft ordinance is dated January 2010, your request came to this Office by e-mail, with the draft ordinance attached, on September 12, 2011.

This memorandum will briefly highlight potential legal issues. It should not be relied upon as a legal opinion or advice from this Office, but is provided as preliminary legal guidance only. Upon direction from the City Council or a Council Committee, this Office will provide the necessary in-depth legal review and analysis.

The draft ordinance is entitled "Proposed Nuisance Language to San Diego City Council, Public Safety and Neighborhood Services Committee." Briefly, it appears that the draft ordinance would make smoking on a multi-family property that substantially interferes with another person's use, comfort and enjoyment of that property a private nuisance. A nuisance is "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Cal. Civ. Code § 3479. A public nuisance affects an entire community or neighborhood, or any considerable number of persons at the same time, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Cal. Civ. Code § 3480. Every nuisance which is not included in the definition of a public nuisance is a private nuisance. Cal. Civ. Code § 3481. An individual has remedies for private nuisance. An individual may abate the private nuisance or file a civil action. Cal. Civ. Code § 3501. The City Council may, by ordinance, declare what constitutes a nuisance. Cal. Gov't Code § 38771.

This Office would like to make you aware of California Senate Bill No. 332 (2011-2012 Reg. Sess.). Senate Bill No. 332 would add section 1947.5 to the California Civil Code and would allow a landlord of a residential dwelling unit, or his or her agent, to prohibit the smoking of a cigarette, as defined in the California Health and Safety Code, or other tobacco product on the property or in any building or portion of the building, including any dwelling unit, other interior or exterior area, or the premises on which it is located. Senate Bill No. 332 will become effective on January 1, 2012. We have attached a copy of Senate Bill No. 332 to this memorandum for your information. As noted previously, this Office will provide more in-depth analysis upon specific direction from the Council or a Council Committee.

JAN I. GOLDSMITH, City Attorney

By Elisa A Cusato
Elisa A. Cusato
Chief Deputy City Attorney

EAC:nja
Attachment

BILL NUMBER: SB 332 CHAPTERED
BILL TEXT

CHAPTER 264
FILED WITH SECRETARY OF STATE SEPTEMBER 6, 2011
APPROVED BY GOVERNOR SEPTEMBER 6, 2011
PASSED THE SENATE AUGUST 15, 2011
PASSED THE ASSEMBLY JULY 11, 2011
AMENDED IN ASSEMBLY JUNE 23, 2011
AMENDED IN ASSEMBLY JUNE 15, 2011
AMENDED IN ASSEMBLY JUNE 6, 2011
AMENDED IN SENATE MAY 3, 2011
AMENDED IN SENATE APRIL 14, 2011

INTRODUCED BY Senator Padilla
(Coauthors: Assembly Members Gordon and Williams)

FEBRUARY 15, 2011

An act to add Section 1947.5 to the Civil Code, relating to tenancies.

LEGISLATIVE COUNSEL'S DIGEST

SB 332, Padilla. Rental dwellings: smoking.

Existing law regulates the terms and conditions of residential tenancies. Existing law authorizes the creation of antitobacco use programs for school-age populations and prohibits any person from smoking a cigarette, cigar, or other tobacco-related product, or from disposing of cigarette butts, cigar butts, or any other tobacco-related waste, within a playground.

This bill would authorize a landlord of a residential dwelling unit to prohibit the smoking of tobacco products on the property, in a dwelling unit, in another interior or exterior area, or on the premises on which the dwelling unit is located. The bill would make certain requirements on notices and leases executed on and after, and on and before, January 1, 2012, in this regard. The bill would require that a landlord who prohibits smoking pursuant to this authority be subject to federal, state, and local requirements governing changes to the terms of a lease or rental agreement for tenants, as specified. The bill would provide that its provisions do not preempt local ordinances in effect on or before January 1, 2012, or a provision of a local ordinance on or after January 1, 2012, that prohibits the smoking of cigarettes or other tobacco products.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) More than 443,000 people die in the United States from tobacco-related diseases every year, making tobacco-related diseases the nation's leading cause of preventable death.

(b) The State Department of Public Health has estimated that 86 percent of adult Californians are nonsmokers. Secondhand smoke is responsible for an estimated 49,400 deaths among nonsmokers each year

in the United States, which includes 3,400 lung cancer deaths and 46,000 deaths due to heart disease. Secondhand smoke also has been proven to cause cancer in humans.

(c) Secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight and increased risk of sudden infant death syndrome (SIDS) in infants of mothers who smoke.

(d) Secondhand smoke exposure causes as many as 300,000 children in the United States under 18 months of age to suffer lower respiratory tract infections, such as pneumonia and bronchitis; exacerbates childhood asthma; and increases the risk of acute, chronic, middle-ear infections in children.

(e) The United States Environmental Protection Agency has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen.

(f) The United States Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke.

(g) The State Air Resources Board has put 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.

(h) The California Environmental Protection Agency has 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.

(i) Thirty-one percent of California's housing is multiunit residences, such as apartments and condominiums.

SEC. 2. Section 1947.5 is added to the Civil Code, to read:

1947.5. (a) A landlord of a residential dwelling unit, as defined in Section 1940, or his or her agent, may prohibit the smoking of a cigarette, as defined in Section 104556 of the Health and Safety Code, or other tobacco product on the property or in any building or portion of the building, including any dwelling unit, other interior or exterior area, or the premises on which it is located, in accordance with this article.

(b) (1) Every lease or rental agreement entered into on or after January 1, 2012, for a residential dwelling unit on property on any portion of which the landlord has prohibited the smoking of cigarettes or other tobacco products pursuant to this article shall include a provision that specifies the areas on the property where smoking is prohibited, if the lessee has not previously occupied the dwelling unit.

(2) For a lease or rental agreement entered into before January 1, 2012, a prohibition against the smoking of cigarettes or other tobacco products in any portion of the property in which smoking was previously permitted shall constitute a change of the terms of tenancy, requiring adequate notice in writing, to be provided in the manner prescribed in Section 827.

(c) A landlord who exercises the authority provided in subdivision (a) to prohibit smoking shall be subject to federal, state, and local requirements governing changes to the terms of a lease or rental agreement for tenants with leases or rental agreements that are in existence at the time that the policy limiting or prohibiting smoking is adopted.

(d) This section shall not be construed to preempt any local ordinance in effect on or before January 1, 2012, or any provision of a local ordinance in effect on or after January 1, 2012, that restricts the smoking of cigarettes or other tobacco products.

(e) A limitation or prohibition of the use of any tobacco product shall not affect any other term or condition of the tenancy, nor shall this section be construed to require statutory authority to

establish or enforce any other lawful term or condition of the tenancy.

San Diego Smoke-Free Housing Task Force

February 6, 2012

Public Safety and Neighborhood Services Committee
202 C. Street
San Diego, CA 92101

Dear Public Safety and Neighborhood Services Committee Members,

We have had the privilege of serving on the City of San Diego's Smoke-Free Housing Task Force for over 2 years. The Task Force was initiated by Council Member Emerald on May 13, 2009 following a presentation to the Public Safety and Neighborhood Services Committee by the San Diego Live and Play Smoke-Free Project. The Task Force is comprised of members of the community representing a wide range of views and backgrounds. Our group includes the San Diego County Apartment Association, California Apartment Association, San Diego Housing Federation, American Lung Association, Tenants Legal Center, SAY San Diego's San Diego Smoke-Free Project, Communities Against Substance Abuse, two renters, the Environmental Health Coalition and the Associate Professor of Epidemiology and Chief of the Division of Global Health at the Department of Family and Preventive Medicine. We reviewed dozens of ordinances from other California cities and counties over the 2 years and have developed the proposed Secondhand Smoke as Nuisance in Multi-Housing Communities Ordinance.

On Wednesday February 1, 2012, the Task Force voted to approve the draft Secondhand Smoke as Nuisance in Multi-Housing Communities Ordinance with minor changes made via email and approved by a majority of the Task Force on February 2, 2012 for consideration by the Public Safety and Neighborhood Services Committee. We request that an action be taken to direct a city attorney to review the proposed draft and work with the Task Force in finalizing the Secondhand Smoke as Nuisance in Multi-Housing Communities Ordinance. It should be noted that the San Diego County Apartment Association and the California Apartment Association are opposed to this and any ordinance that results in landlords bearing the burden of enforcement and/or imposes non-smoking mandates on multi-family housing.

We greatly appreciate the opportunity to have advised the Committee on this issue and all of your diligent efforts to bring a draft ordinance before you that would support both multi-housing community tenants and landlords/managers.

Respectfully submitted,

San Diego Smoke-Free Housing Task Force

Encl: (1)

TOBACCO FREE
communities coalition

CHAIR:
Lynda Barbour

MEMBERS:
American Cancer Society
American Heart Association
American Lung Association in California
California Smoker's Helpline
Communities Against Substance Abuse
Catholic Charities Diocese of San Diego
Coronado SAFE Foundation
Institute for Public Strategies
9th District PTA
North Inland Community Prevention Program
Partnership for Smoke-Free Families
San Diego-Tijuana Border Initiative
San Dieguito Alliance for Drug Free Youth
San Diego County Office of Education, Tobacco Use Prevention Education (TUPE)
SAY San Diego
Student Health Services, UCSD
The Palavra Tree, Inc.
Union of Pan Asian Communities
Vista Community Clinic

AMERICAN LUNG ASSOCIATION IN CALIFORNIA

STAFF:
Lisa Archibald, Debra Kelley, Ofelia Alvarado, Lindsay Darnell

February 7, 2012

Councilmember Emerald, Chair Public Safety and Neighborhood Services (PS&NS) Committee
City of San Diego
202 C Street
San Diego, CA 92102

Dear Councilmember Emerald,

RE: Support for the proposed language that declares secondhand smoke as a nuisance in multi-unit housing settings

The Tobacco Free Communities Coalition supports Councilmember Emerald and the San Diego Smoke-Free Housing Task Force members in their effort to develop a policy solution to support residents whose health is impacted by secondhand smoke exposure in their homes.

The Tobacco Free Communities Coalition (TFCC) is a countywide group of agencies and individuals dedicated to improving the health of our communities through strong tobacco control policies and practices. We believe that a nuisance policy is an important step in improving the quality of life for seniors, children and families exposed to secondhand smoke in multi-unit housing in San Diego. There is solid data supporting the need for a policy solution to address secondhand smoke exposure in housing.

- Only 11% of Californians smoke; the remaining 89% are left unprotected.
- Poll results from *The Center for Tobacco Policy and Organizing* find:
  - 78% of California voters support a law requiring apartment buildings to offer nonsmoking sections.
  - 69% of apartment residents throughout California would favor requiring all apartment buildings to offer nonsmoking sections
  - 67% would favor limiting smoking in outdoor common areas such as pool areas, entryways, and courtyards.
  - Nearly 90% of tenants believe exposure to secondhand smoke is harmful, with nearly two-thirds of those (63% of all tenants) saying it is "very harmful." Of these tenants who believe exposure to secondhand smoke is very harmful, 81 % endorse separate non-smoking sections in apartment buildings.

- In 2008 San Diego State University Social Science Research Laboratory conducted a telephone survey of 200 apartment residents in San Diego and found:
  - 79% agreed we need laws to protect non-smokers in multi-unit housing from secondhand smoke.
  - 90% agreed people that do not smoke have the right to live in smoke-free housing.
  - 71% would like to live in an apartment that does not allow smoking anywhere.

We appreciate the San Diego City Council for enacting local tobacco control ordinances including smoke-free parks and beaches and tobacco retailer licensing, and encourage you to continue the City's leadership in protecting the public health from the harms of tobacco.

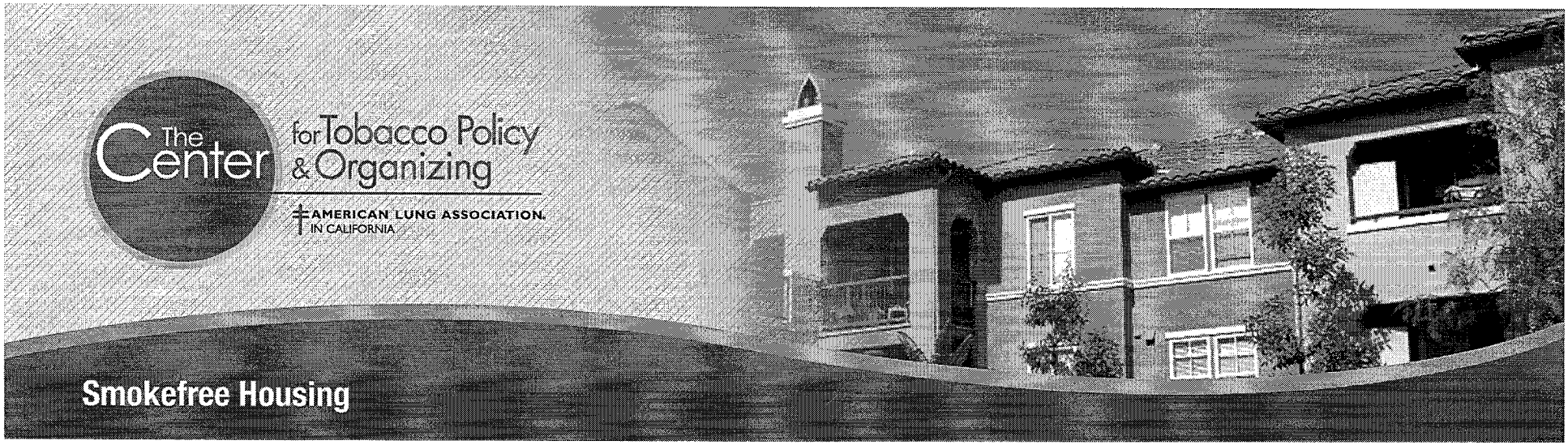
The proposed nuisance language will provide multi-unit housing tenants, apartment managers/owners, and tenant legal rights advocates with a tool to address secondhand smoke. The Tobacco Free Communities Coalition strongly supports the development and implementation of an ordinance that will reduce exposure to secondhand smoke in multi-unit housing.

Sincerely,

Lynda Barbour

Lynda Barbour
Chair, Tobacco Free Communities Coalition

CC: Councilmember Zapf
Councilmember Gloria
Councilmember Alvarez



Comparison of Nonsmoking Housing Units Ordinances

November 2011

Cities and counties in California have led the way on many secondhand smoke issues throughout the years by passing groundbreaking local ordinances to restrict smoking in certain areas. On the issue of smokefree housing, California's communities are once again paving the way. Secondhand smoke exposure in multi-unit housing is a serious health threat because secondhand smoke drifts into housing units from other units, balconies, patios and common areas. The most effective way to address this problem is to pass a policy that restricts smoking within units, which includes balconies and patios, in multi-unit housing.

There are now 23 jurisdictions in California that have adopted an ordinance that prohibits smoking within a certain percentage of units in multi-unit housing. The table on the following pages lists questions about policy and enforcement provisions of smokefree housing ordinances and provides the answers for each of the 23 jurisdictions. This table makes it easier to learn more about and understand in detail these ordinances, as well as providing some guidance on the types of issues that need to be addressed by other communities working on a smokefree housing ordinance. The 23 cities and counties are listed in reverse chronological order on the following three pages.

Page 2 - Alameda, Baldwin Park, Compton, Sonoma County, Tiburon, Pasadena, Fairfax, Larkspur and Union City

Page 3 - Santa Clara County, Contra Costa County, Sebastopol, South Pasadena, Pinole, Pleasant Hill and Richmond

Page 4 - Rohnert Park, Dublin, Loma Linda, Novato, Calabasas, Belmont and Temecula

More information about all of these policies can be found in the Center's Matrix of Local Smokefree Housing Policies, which contains the full details on all of the policy and enforcement provisions in each smokefree housing ordinance. These documents and other smokefree housing documents are all available on the Center's website, www.Center4TobaccoPolicy.org/localpolicies-smokefreehousing.

The Center for Tobacco Policy & Organizing • American Lung Association in California
1029 J Street, Suite 450 • Sacramento, CA 95814 • Phone: (916) 554.5864 • Fax: (916) 442.8585 • www.Center4TobaccoPolicy.org

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BREAKDOWN OF NONSMOKING HOUSING UNITS ORDINANCES (policies adopted from November 2010 to the present)

	POLICY PROVISIONS						ENFORCEMENT PROVISIONS				
	Date Passed/ Population	What percentage of units is required to be designated as nonsmoking?	When do the nonsmoking units restrictions go into effect?	Are current tenants who smoke grandfathered in, that is, allowed to smoke in their current unit past the implementation date?	Do the nonsmoking unit requirements apply to condominiums?	What is the minimum size multi-unit housing that is required to have nonsmoking units?	Is secondhand smoke declared a nuisance?	All landlords are able to evict for violations of a local law. Does this ordinance contain any additional eviction provisions?	Can a tenant enforce the nonsmoking lease provisions against a violating tenant?	Is there a private enforcement provision that allows the public to enforce the nonsmoking law against violating parties?	How are violations of the ordinance punishable by the city/county?
ALAMEDA	November 2011/ 74,081	100%	14 months for existing, new when completed	No	Yes	2 units	No	No	Yes	Yes	Infraction with fines starting at $100
BALDWIN PARK	November 2011/ 75,664	100%, up to 20% of existing units may be designated as smoking units	3 years for existing, 6 months for new	No	Yes	2 units	Yes	No	Yes	Yes	Infraction with fines starting at $500
COMPTON	October 2011/ 96,925	100%	14 months for existing, new when completed	No	Yes	3 units	No	No	Yes	Yes	Infraction with a fine of $100
SONOMA COUNTY	September 2011/ 146,238	100%	14 months for existing units; 6 months for new	No	Yes	2 units	No	No	No	No	Infraction with fines starting at $100 and subject to civil action
TIBURON	July 2011/ 9,031	100%	35 months for existing; new when completed	No	No	4 units	No	No	Yes	Yes	Infraction with a fine up to $100
PASADENA	July 2011/ 138,915	100%	18 months for existing units; new when completed	No	Yes	2 units	No	No	No	No	In accordance with the citation schedule in the municipal code
FAIRFAX	May 2011/ 7,497	75%	14 months	No	Yes	4 units	Yes	No	Yes	Yes	In accordance with the town code; a written warning must be provided before a civil penalty is assessed
LARKSPUR	April 2011/ 12,014	100%, up to 20% of existing units may be designated as smoking units	13 months for existing; new when completed	No	Yes	2 units	Yes	No	Yes	Yes	Infraction with a fine of $100 and subject to civil enforcement
UNION CITY	November 2010/ 69,850	100%	14 months for existing; new when completed	No	No	2 units	Yes	No	Yes	Yes	Infraction with a fine of $100 and subject to civil action by the city

BREAKDOWN OF NONSMOKING HOUSING UNITS ORDINANCES (policies adopted from July 2009 to November 2010)

	POLICY PROVISIONS						ENFORCEMENT PROVISIONS				
	Date Passed/ Population	What percentage of units is required to be designated as nonsmoking?	When do the nonsmoking units restrictions go into effect?	Are current tenants who smoke grandfathered in, that is, allowed to smoke in their current unit past the implementation date?	Do the nonsmoking unit requirements apply to condominiums?	What is the minimum size multi-unit housing that is required to have nonsmoking units?	Is secondhand smoke declared a nuisance?	All landlords are able to evict for violations of a local law. Does this ordinance contain any additional eviction provisions?	Can a tenant enforce the nonsmoking lease provisions against a violating tenant?	Is there a private enforcement provision that allows the public to enforce the nonsmoking law against violating parties?	How are violations of the ordinance punishable by the city/county?
SANTA CLARA COUNTY	November 2010/ 85,669	100%	14 months for existing; new when completed	No	Yes	2 units	No	No	Yes	No	Infraction with fines starting at $100 and subject to civil action by the county
CONTRA COSTA COUNTY	October 2010/ 161,143	100% new	All new multi-unit housing that receives building permit after Jan. 1, 2011	N/A	Yes	4 units	No	Yes	No	No	Any means allowed by the municipal code
SEBASTOPOL	August 2010/ 7,423	100%	14 months	No	Yes	2 units	Yes	No	Yes	Yes	Infraction with a fine of $100
SOUTH PASADENA	August 2010/ 25,692	100%, up to 20% of existing units may be designated as smoking units	3 years	No	Yes	2 units	Yes	No	Yes	Yes	Infraction with a fine of $100
PINOLE	April 2010/ 18,460	100% new	Immediately	N/A	Yes	2 units	No	No	No	No	Infraction with fines starting at $100
PLEASANT HILL	April 2010/ 33,279	50% existing, 100% new	5 years from January 2011 when nonsmoking unit designations begin	No	No	4 units	Yes	No	No	No	Any means allowed by the municipal code
RICHMOND	July 2009/ 104,220	100%	17 months for existing; new units when completed	No	Yes	2 units	No	No	Yes	Yes	$100 fine

BREAKDOWN OF NONSMOKING HOUSING UNITS ORDINANCES (policies adopted prior to July 2009)

	POLICY PROVISIONS						ENFORCEMENT PROVISIONS				
	Date Passed/ Population	What percentage of units is required to be designated as nonsmoking?	When do the nonsmoking units restrictions go into effect?	Are current tenants who smoke grandfathered in, that is, allowed to smoke in their current unit past the implementation date?	Do the nonsmoking unit requirements apply to condominiums?	What is the minimum size multi-unit housing that is required to have nonsmoking units?	Is secondhand smoke declared a nuisance?	All landlords are able to evict for violations of a local law. Does this ordinance contain any additional eviction provisions?	Can a tenant enforce the nonsmoking lease provisions against a violating tenant?	Is there a private enforcement provision that allows the public to enforce the nonsmoking law against violating parties?	How are violations of the ordinance punishable by the city/county?
ROHNERT PARK	April 2009/ 41,194	50% existing, 75% new	25 months for existing; new when completed	Yes	Yes	2 units	No	No	No	Yes	Infraction
DUBLIN	December 2008 (updated July 2011)/ 46,743	75%	25 months	No	No	16 units	Yes	No	Yes	Yes	Infraction / fines starting at $100
LOMA LINDA	June 2008/ 23,395	70%	3 1/2 years	Yes	No	2 units	Yes	Yes	Yes	No	Infraction
NOVATO	April 2008/ 52,311	50% existing, 75% new	90 days	Yes	Yes	10 units	Yes, in a place of human habitation	No	Yes	Yes	Infraction with fines starting at $100; a warning letter must be provided before civil penalties are assessed
CALABASAS	January 2008/ 23,134	80%	4 years	Yes	No	2 units	Yes	Yes	Yes	Yes	Misdemeanor or infraction and subject to civil action by the city
BELMONT	October 2007/ 26,031	100%	14 months	No	Yes	2 units that share a common floor and/or ceiling	Yes	No	Yes	No	Infraction subject to a $100 penalty and civil action by the city
TEMECULA	May 2007/ 101,657	25%	5 years, up to 8 years with extensions	Yes	No	10 units	No	No	No	No	All penalties outlined in the municipal code and subject to civil action by the city

Model California Ordinance Regulating Smoking in Multi-Unit Residences

(with Annotations)

Revised December 2009
(Originally issued April 2005)

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.

www.phlpnet.org • talc@phlpnet.org • (510) 302-3380

Introduction

The Technical Assistance Legal Center (TALC) 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.

The Ordinance's comprehensive design limits exposure to secondhand smoke by restricting smoking in common areas (indoors and outdoors), creating smokefree buffer zones, and prohibiting smoking in individual units. Communities may choose to include some or all of the options offered in the Model Ordinance, depending on the jurisdictions' policy objectives. TALC can help adapt this Model Ordinance to meet an individual community's needs.

To assist cities and counties in creating smokefree multi-unit housing, this Model Ordinance includes:

- Extensive findings based on the latest scientific information documenting the health risks associated with tobacco use and exposure to secondhand smoke;
- Restrictions on 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;
- Smokefree buffer zones that can expand to include neighboring property and/or balconies and patios of adjacent units to limit drifting secondhand smoke from entering nonsmoking areas;
- Prohibitions on smoking inside the units of multi-unit residences, including apartments and condominiums;
- Recommended procedures for designating nonsmoking units by landlords and homeowners' associations; and
- Robust enforcement mechanisms including no-smoking lease terms and options for private individuals and organizations to enforce the smokefree housing provisions.

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 – as well as apartments and condominiums. Some of the comments in the Model Ordinance describe how to narrow the scope of the smoking restrictions, should that be necessary.

In addition, this Model Ordinance provides a step-by-step approach to designating nonsmoking units, including a recommended implementation process that allows tenants and landlords to become familiar with the new smoking restrictions over a 12-month period. Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair and effective approach – balancing public health needs against the potential inconvenience the ordinance puts on tenants who smoke and landlords who must implement the new policy.

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.

This Model Ordinance offers a variety of options. In some instances, blanks (e.g., [____]) prompt you to customize the language to fit your community's needs. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure that the ordinance is consistent with a community's existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

TALC has also developed other ordinances to create smokefree outdoor areas, such as parks, beaches, dining patios, and public events. If you would like to adopt a comprehensive or more customized approach, some aspects of other TALC ordinances can be combined with this ordinance. If you have questions about how to adapt this or other TALC ordinances 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 ____] 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.

The [City Council / County Board of Supervisors] of [____] hereby finds and declares as follows:

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

- Tobacco-related illness is the leading cause of preventable death in the United States,[1] accounting for about 443,000 deaths each year;[2] and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;[3] and
- Some of the most common types of cancers, including stomach, liver, uterine cervix, and kidney cancers, are related to tobacco use;[4] and

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

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;[5] and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;[6] and

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

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

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

[4] Leistikow B, Zubair K, et al. "Male Tobacco Smoke Load and Non-Lung Cancer Mortality Associations in Massachusetts." *BMC Cancer,* 8:341, 2008. Available at: www.biomedcentral.com/1471-2407/8/341.

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

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

- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;[7] and

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

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;[8] and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;[9] and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;[10] and exacerbates childhood asthma;[11] and

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;[12] and

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

- The total annual economic burden of smoking in the United States is $193 billion;[13] and
- From 2001-2004, the average annual health care expenditures attributable to smoking were approximately $96 billion;[14] and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over $10 billion per year in the United States in 2005;[15] 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

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

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

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

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

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

[12] 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.

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

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

[15] Behan DF, Eriksen MP and Lin, Y. *Economic Effects of Environmental Tobacco Smoke*. Schaumburg, IL: Society of Actuaries, 2005, p. 2. Available at: www.soa.org/files/pdf/ETSReportFinalDraft(Final%203).pdf.

alone;[16] and

- California's Tobacco Control Program saved the state and its residents $86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly;[17] and

WHEREAS, smoking is the primary cause of fire-related injuries and deaths in the home, as evidenced by the following:

- Cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States,[18] causing an estimated 142,900 smoking-related fires, 780 deaths, 1,600 injuries, and $606 million in direct property damage in 2006;[19] and
- One in four fatalities from home fires caused by smoking is NOT the smoker whose cigarette started the fire, and 25% of those deaths were of neighbors or friends of the smoker;[20] and
- Smoking in a residence where long-term oxygen therapy takes place is very dangerous as oxygen is a fire accelerant, and 27% of fatalities due to smoking during long-term oxygen therapy occurred in multifamily dwellings;[21] and
- The United States Fire Administration recommends that people smoke outdoors;[22] and

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

- Secondhand smoke can seep under doorways and through wall cracks;[23] and
- Persons living in apartments near smokers can be exposed to elevated pollution levels for 24 hours a day, and at times, the particulate matter exposure can exceed the U.S.

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[16] 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.

[17] Lightwood JM, Dinno A and Glantz SA. "Effect of the California Tobacco Control Program on Personal Health Care Expenditures." *PLoS Med,* 5(8): e178, 2008. Available at: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050178.

[18] Leistikow B, Martin DC and Milano CE. "Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview." *Preventive Medicine,* 31: 91-99, 2000. Available at: http://leistikow.ucdavis.edu/SmokingFires.pdf.

[19] Hall JR. *U.S. Smoking-Material Fire Problem.* Quincy, MA: National Fire Protection Association, 2008, p. vii. Available at: www.nfpa.org/assets/files//PDF/OS.Smoking.pdf. (Factsheet available at: www.nfpa.org/assets/files//PDF/smokingfactsheet.pdf.)

[20] Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis.* US Department of Homeland Security, 2006, p. 17. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

[21] US Department of Health and Human Services, Centers for Disease Control and Prevention. "Fatal Fires Associated with Smoking During Long-Term Oxygen Therapy – Maine, Massachusetts, New Hampshire, and Oklahoma, 2000 – 2007." *Morbidity and Mortality Weekly Report,* 57(31): 852-854, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5731a3.htm?s_cid=mm5731a3_e.

[22] Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis.* US Department of Homeland Security, 2006, p. 19. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

[23] Wagner J, Sullivan DP, Faulkner D, et al. "Environmental Tobacco Smoke Leakage from Smoking Rooms." *Journal of Occupational and Environmental Hygiene,* 1: 110-118, 2004. Available at: http://eetd.lbl.gov/IEP/pdf/LBNL-51010.pdf.

Environmental Protection Agency's 24-Hour Health Based Standard;[24] and

- 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;[25] and

WHEREAS, most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- Nearly 87% of Californians and 91% of California women are nonsmokers;[26] and
- 74% of Californians surveyed approve of apartment complexes requiring at least half of rental units be nonsmoking;[27] and
- 69% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings and 78% support laws that create nonsmoking units;[28] and
- 62% of California renters feel that there is a need for laws to limit smoking in apartments;[29] 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;[30] and

WHEREAS, there is no Constitutional right to smoke;[31] and

WHEREAS, California law prohibits smoking in virtually all indoor places of employment reflecting the state policy to protect against the dangers of exposure to secondhand smoke;[32] and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free

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[24] Klepeis N. *Measuring the Seepage of Tobacco Smoke Particles Between Apartment Units.* California's Clean Air Project, 2008. Available at: http://ccap.etr.org/base/documents/Measuring_the_Seepage.pdf.

[25] 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.* 2006, p. 11. Available at: www.cdc.gov/tobacco/data_statistics/sgr/sgr_2006/index.htm#full.

[26] California Department of Health Services. *News Release, New Data Show 91 Percent of California Women Don't Smoke.* 2007. Available at: www.applications.dhs.ca.gov/pressreleases/store/PressReleases/07-37%20dhs%20smoking%20rates-with%20charts.html.

[27] Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure.* 2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

[28] Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure..*2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

[29] American Lung Association of California, Center for Tobacco Policy and Organizing. *Statewide Apartment Renter Study.* 2004. Available at: www.center4tobaccopolicy.org/_files/_files/5242_Center%20Renter%20Survey%20Results%20May%202004.pdf (A survey of apartment residents throughout California).

[30] Cal. Legislative Counsel Op., 21547, *Secondhand Smoke in Multi-Unit Housing (Apartments & Condos) Smoking Bans: Residential Rental Property*, (September 23, 1999). Highlights available at: www.respect-ala.org/drift_samsmokingbans.htm.

[31] Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke.* 2005. Available at: www.phlpnet.org/tobacco-control.

[32] Cal. Lab. Code § 6404.5 (West 2009).

use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance;[33] and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance;[34] 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 non-tobacco 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 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 / , but does not include property containing only residential structures].

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 *3 "Nonsmoking Buffer Zones").

Four options are available, listed below from the strongest to the weakest protections.

Option one—*Include Everything*: Include *all* adjoining property, public and private, by omitting all bracketed language. With this option, a smokefree buffer zone might encompass a portion of the backyard of a single-family residence.

Option two—*Include Everything but Single-Family Homes*: Include all adjoining property, public and private, *except* single-family residences by including only the single-underlined language.

Option three—*Include Everything but Residential Property*: Include all adjoining property, public and private, *except* residential property (e.g., single-family residences or Multi-Unit Residences) by including only the double-underlined language. This option still includes, for example, outdoor areas of businesses, parking lots, and some places not open to the general public such as members-only clubs

Option four—*Exclude Everything*: Do not include *any* adjoining

[33] Cal. Civil Code § 3479 (West 2009).

[34] *In Re Jones*, 56 Cal.App.2d 658, 663 (1943); *See also* Cal. Const., art. XI, § 7 and Cal. Gov. Code § 38771 (West 2009).

property in the buffer zones, in which case the entire definition should be deleted.

(b) "Common Area" means every Enclosed Area or Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit of that Multi-Unit Residence are entitled to enter or use, including, for example, halls and paths, lobbies and courtyards, elevators and stairs, community rooms and playgrounds, gym facilities and swimming pools, parking garages and parking lots, shared restrooms, shared laundry rooms, shared cooking areas, and shared eating areas.

COMMENT: 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) "Common Interest Complex" means a Multi-Unit Residence that is a condominium project, [a community apartment project,] [a stock cooperative,] [or a planned development] as defined by California Civil Code section 1351.

COMMENT: This definition is used to distinguish owned multi-unit housing (e.g., condominiums and townhomes) from other types of Multi-Unit Residences, such as apartments that are leased, which are defined in the term "Rental Complex" (see below). The distinction between all types of Multi-Unit Residences and those that are owned is necessary if a community decides to regulate smoking in less than 100% of *existing* Units in Multi-Unit Residences (see Sections *5 and *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

The list of optional Common Interest Complexes includes other types of housing that, like condominiums, have covenants, conditions, and restrictions (CC&Rs) and are managed by a homeowners' association.

(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 vertical boundaries of any height whether or not those boundaries include vents or other openings; or

(2) [four (4)] walls or other vertical boundaries that exceed [six (6)] feet in height whether or not those boundaries include vents or other openings.

COMMENT: The number of walls and the height threshold can be customized to meet the needs of your community, and changing these numbers will affect the scope of the ordinance. Reducing

the number of walls in this definition would broaden the definition of Enclosed Area, which would result in narrowing the definition of Unenclosed Area. For the purposes of this ordinance, the distinction between "enclosed" and "unenclosed" is primarily relevant to establishing designated Smoking areas (see Section *2) and nonsmoking buffer zones (see Section *3).

An area that is partially covered by anything would be analyzed under subparagraph (1), whereas only areas that are totally uncovered would be analyzed under subparagraph (2). It can be difficult to apply Labor Code section 6404.5 to areas that are surrounded by lattice, hedges, and other nonsolid structures. For purposes of this ordinance any vertical boundary, regardless of composition, constitutes an "other vertical boundary" for application of this definition.

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

(e) "Landlord" means any Person who owns property let for residential use, any Person who lets residential property, and any Person who manages such property, except that "Landlord" does not include a master tenant who sublets a Unit as long as the master tenant sublets only a single Unit of a Multi-Unit Residence.

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 [, except the following specifically excluded types of housing:

(1) a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2);
(2) a mobile home park;
(3) a campground;
(4) a marina or port;
(5) a single-family home;
(6) a single-family home with a detached or attached in-law or second unit when permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City / County] adopted pursuant to those sections; and
(7) ____].

COMMENT: Because the definition of Unit in this ordinance is so broad and includes all types of dwelling places—from rooms in a hotel to tents at a campground—a community may want to limit the types of dwelling places covered by the smokefree housing ordinance. The optional language provides examples of the types of exceptions that communities are likely to consider.

Note that the definition of Multi-Unit Residence without any exemptions would include the following types of dwelling places: apartments, condominium projects, townhomes, stock cooperatives, and co-housing; affordable housing (for seniors, for

disabled tenants, for Section 8, etc.); long-term health care facilities, assisted living facilities, hospitals, and family support facilities; hotels, motels, single room occupancy ("SRO") facilities, dormitories, and homeless shelters; mobile home parks, campgrounds, marinas, and ports; single-family homes and single-family homes with an in-law unit.

(g) "New Unit" means a Unit that is issued a [certificate of occupancy / final inspection] more than 180 days after [*insert effective date of ordinance*] [and also means a Unit that is let for residential use for the first time more than 180 days after [*insert effective date of ordinance*]].

COMMENT: This definition is used to differentiate between Units that are already built 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, whereas Smoking could be allowed in some Units of existing multi-unit housing.

The definition incorporates a trigger date of 180 days after the ordinance takes effect so as to "grandfather" buildings already under construction.

The *certificate of occupancy* or *final inspection* is probably the most administrable way to distinguish between existing and New Units. However, a community could distinguish between Units for which land use entitlements have or have not issued or Units which 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 had previously never been rented, 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 of a Multi-Unit Residence in which Smoking is prohibited by: (1) this [chapter / article] or other law; (2) by binding agreement relating to the ownership, occupancy, or use of real property; or (3) by designation of a Person with legal control over the area. In the case of a Smoking prohibition 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 to engage in Smoking or to allow Smoking in that area unless: (1) the Person knows that Smoking is not permitted; or (2) a reasonable Person would know that Smoking is not permitted.

(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

the City and County.

(j) "Rental Complex" means a Multi-Unit Residence for which fifty percent (50%) or more of Units are let by or on behalf of the same Landlord.

COMMENT: This definition is used to distinguish traditional rental housing (e.g., apartments, SROs) from other types of Multi-Unit Residences, such as condominiums that are owner-occupied. The distinction between all types of Multi-Unit Residences and those that are leased is necessary if a community decides to regulate smoking in less than 100% of *existing* Units in Multi-Unit Residences (see Section *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

(k) "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, marijuana smoke, and crack cocaine smoke.

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

This definition includes e-cigarettes. It also marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

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

COMMENT: This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

(m) "Unenclosed Area" means any area that is not an Enclosed Area.

(n) "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 long-term health care facility, assisted living facility, or hospital; a hotel or motel room; a room in a single room occupancy ("SRO") facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit. Unit includes a New Unit.

> **COMMENT:** This definition is intentionally extremely broad. It is designed to capture all conceivable "dwelling spaces" as the examples illustrate. However, because of the way that this model ordinance is designed, any limitations on the types of housing covered by the ordinance should be added to the defined term "Multi-Unit Residence" and *not* here. For example, some "mobile homes" in mobile home parks may be included in this definition and even cited in the examples but, nevertheless, "mobile homes" can be specifically excluded from the ordinance under the definition of "Multi-Unit Residence."

Sec. [____ (*2)]. 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 is prohibited in all Common Areas pursuant to Section [___ (*9)] except that 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 that at all times the designated Smoking area complies with paragraph (b) below.

(b) A designated Smoking area:

(1) Must be an Unenclosed Area.

(2) Must be located at least twenty-five (25) feet from any Enclosed Area that is a Nonsmoking Area. A Person with legal control over a Common Area in which a designated Smoking area has been designated shall modify, relocate or eliminate that designated Smoking area so as to maintain compliance with the requirements of this subsection (b) as laws change, as binding agreements are created, and as Nonsmoking Areas on neighboring property are established.

> **COMMENT:** This clause limits where a designated Smoking area can be located in order to prevent drifting Smoke from entering smokefree areas. As written, it includes areas on neighboring property that are designated as nonsmoking by contract (e.g., a smokefree lease term for a rental unit next to, but not part of, the Multi-Unit Residence) and areas on neighboring property designated by a property owner or lessee as nonsmoking (e.g., a neighboring business or homeowner).

(3) 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.

(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.

(c) 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.

(d) Clear and unambiguous "No Smoking" signs shall be posted in sufficient numbers and locations to make Common Areas where Smoking is prohibited by this [article / chapter] or other law obvious to a reasonable person. The signs shall have letters of no less than one inch in height or contain the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle crossed by a red bar). 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].

Sec. [____ (*3)]. NONSMOKING BUFFER ZONES.

(a) Smoking is prohibited in Unenclosed Areas of Multi-Unit Residence, including balconies, porches, decks, and patios, within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.

> **COMMENT:** This section addresses the problem of Smoking so close to a "nonsmoking" area that Smoke easily drifts into it. This restriction even applies to Smoking on exclusive-use balconies, porches, decks, and patios of Units where Smoking would otherwise be allowed, *if* these areas are within 25 feet of a nonsmoking Unit. A community can make *all* exclusive-use outdoor areas nonsmoking. To do so, include the optional subsection (d) below.

[(b) Smoking is prohibited in Unenclosed Areas of Adjacent Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.]

> **COMMENT:** To create the most comprehensive smokefree buffer zone, include this option. This subsection 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 selecting a version of the "Adjacent Property" definition to exempt certain types of neighboring property, such as property containing detached single-family homes, while still prohibiting Smoking on other private property, such as bar patios and loading docks. If this option is not included in your community's ordinance, the defined term "Adjacent Property" in Section *1 should be deleted.

[(c) Subsections (a) and (b) above do 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 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 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.

[(d) Notwithstanding any other provision of this [article / chapter], Smoking is prohibited in all exclusive-use Unenclosed Areas associated with a Unit, such as, for example, a private balcony, porch, deck, or patio.]

COMMENT: This optional subsection prohibits Smoking in *all* exclusive-use outdoor areas that are associated with a Unit even if Smoking is permitted within the Unit (i.e., it is not a designated nonsmoking Unit). By doing so, this subsection unambiguously addresses the problem of Smoke drifting from the balcony or patio of one Unit into a neighboring Unit, a top complaint from residents living in multi-family housing. On the other hand, it might have the effect of leading people to increase their Smoking in the Unit, despite public health and fire safety advice to only engage in Smoking outside.

Sec. [____ (*4)]. SMOKING RESTRICTIONS IN NEW UNITS OF MULTI-UNIT RESIDENCES.

(a) All New Units of a Multi-Unit Residence are hereby designated nonsmoking Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio; and including without limitation New Units in a Rental Complex and New Units in a Common Interest Complex.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

COMMENT: As written, this section applies to *all* New Units of a Multi-Unit Residence. While the percentage of nonsmoking New Units required is a policy choice and may be modified, 100% nonsmoking Units is recommended. If your community chooses to require a lesser percentage, substitute the following provision:
(a) Up to one hundred percent (100%), but no less than [ninety percent (90%)], of New Units of a Multi-Unit Residence, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units by the Person or Persons causing the construction of the New Units.

*(b) Smoking in a designated nonsmoking Unit shall be a violation of this [article / chapter] as provided in Section [___ (*9)].*

(c) Designated nonsmoking Units shall not share a ventilation system with a Unit in which Smoking may be allowed. To the

maximum extent practicable, nonsmoking Units shall be grouped together vertically and horizontally and physically separated from Units where Smoking may be allowed. Where possible, all units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

*(d) The designations required by subsection (a) above shall be permanent; shall be submitted in accordance with Section [___ (*10)]; and shall be submitted by the Person who controls the Multi-Unit Residence in which the New Unit is located prior to any sale or lease of a New Unit and before a New Unit is occupied. The submitted designations must contain a description of each designated nonsmoking Unit sufficient to identify the Unit and must be accompanied by a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.*

Sec. [____ (*5)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A COMMON INTEREST COMPLEX.

COMMENT: This subsection prohibits Smoking inside *all* existing Units in a Common Interest Complex, such as condominiums, but provides an opportunity for the homeowners' association to hold an election to allow Smoking in some of the existing Units. A potential incentive for a Common Interest Complex to establish 100% nonsmoking Units is that *no action* is required to set this standard. Action is only required if the Common Interest Complex wishes to "opt out" of the 100% default established in subsection (a).

If your community wants to prohibit Smoking in *all* existing Units of Common Interest Complexes regardless of owner preferences, omit subsection (c) and the reference to it in subsection (a) (*"provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below."*). On the other hand, if your community wants to regulate *only* Rental Complexes and not Common Interest Complexes, delete this entire Section (*5).

(a) All Units of a Common Interest Complex 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, are hereby designated nonsmoking Units as of [*insert effective date of ordinance + 1 year*]; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

(c) By a vote of the membership as provided in subsection (1) below, a Common Interest Complex may choose to designate fewer than one-hundred percent (100%) of existing Units as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (4) below. Otherwise subsection (a) above shall apply.

(1) A vote by the membership on the threshold question of allowing less than one hundred percent (100%) of Units to be designated nonsmoking Units must take place before [*insert*

effective date of ordinance + *270 days*].

> **COMMENT:** The recommended timeframe of 270 days (or nine months) is suggested as a reasonable amount of time to organize and hold the homeowners' association election while adhering to the legally required guidelines.

(2) Up to one hundred percent (100%), but no less than [eighty percent (80%)], of Units that are not New Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units.

(3) Where possible, best efforts shall be made to group nonsmoking Units together, both horizontally and vertically, and physically separate them from Units where Smoking may be allowed.

(4) No later than [*insert effective date of ordinance* + *1 year*] the final designations must be made and the following must be submitted in accordance with Section [___ (*10)]:

(i) a description of each designated nonsmoking Unit sufficient to readily identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

Sec. [____ (*6)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A RENTAL COMPLEX.

> **COMMENT:** This subsection prohibits Smoking inside *all* existing Units in a Rental Complex, but provides an opportunity for a Landlord to allow Smoking in some of the existing Units. A potential incentive for a Landlord to establish 100% nonsmoking Units is that only *limited action* is required by a Landlord to set this standard. Substantial action is required if the Landlord wishes to "opt out" of the 100% default established in subsection (a).
>
> If your community wants to prohibit Smoking in *all* existing Units of Multi-Unit Residences regardless of Landlord preference, omit subsection (d) entirely and all references to subsection (d) in subsections (a)–(c).

(a) All Units of a Rental Complex 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, are hereby designated nonsmoking Units as of [*insert effective date of ordinance* + *120 days*]; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Landlord fully complies with subsection (d) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

(c) Except if a Landlord fully complies with subsection (d) below, at least sixty (60) days before [*insert effective date of ordinance + 120 days*], the Landlord shall provide each tenant with:

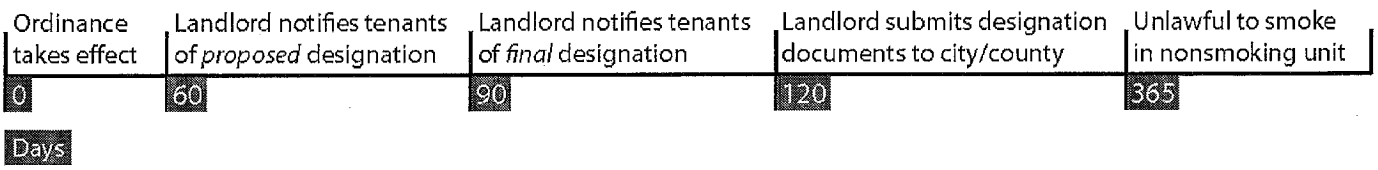
(1) a written notice clearly stating that all Units, including the tenant's Unit, are designated nonsmoking Units and that Smoking in a Unit will be illegal as of [*insert date specified in Sec. *9(c)*]; and

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

(d) A Landlord may choose to designate fewer than one-hundred percent (100%) of existing Units that are not New Units of a Rental Complex as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (7) below. However, subsection (a) above shall apply whenever a Landlord takes no action or only partially complies with the requirements of this subsection.

COMMENT: This subsection provides a step-by-step approach to designating nonsmoking and Smoking-allowed Units in Rental Complexes. This ordinance contains a recommended implementation process that allows tenants and Landlords to become familiar with the new Smoking restrictions over a 12-month period. Here is a timeline illustrating the implementation schedule:

Timeline to Designate Nonsmoking Units



Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair approach—balancing public health needs against the potential inconvenience the ordinance puts on Smoking tenants and Landlords who must implement the new policy. For legal reasons, a *12-month* phase-in period strikes a good balance between the potential legal rights of tenants under existing agreements and the legal authority of Landlords to modify those agreements as this ordinance requires.

Your community may want to provide additional recommendations or guidelines for Landlords on what other steps a Landlord might want to take when designating nonsmoking Units. These could include conducting a tenant survey to determine who would like to live in a nonsmoking Unit, holding a house meeting to discuss the new policy, and/or hosting cessation classes for tenants.

Alternative approaches to the 12-month phase-in period could include multiple-year phase-in periods based on tenant turnover, waivers to smokers who request them, and permanent

grandfathering. A 12-month phase-in approach, however, is a more effective strategy. Please contact TALC for assistance if an alternative to the phase-in period is desired.

(1) The Landlord shall permanently designate up to one hundred percent (100%) of Units, but no less than [eighty percent (80%)] of Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, as nonsmoking Units by the Landlord.

(2) To the maximum extent practicable, nonsmoking Units must be grouped together both horizontally and vertically and physically separated from Units where Smoking may be allowed. Where possible all Units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

(3) No later than [*insert effective date of ordinance + 120 days*] a Landlord who chooses to designate fewer than 100% of the Units of a Multi-Unit Residences as nonsmoking shall submit the following in accordance with Section [___ (*10)]:

(i) a description of each designated nonsmoking Unit sufficient to identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

(4) At least sixty (60) days before submitting the nonsmoking Unit designations required by subsection (3) above, the Landlord shall provide each tenant with:

(i) a written notice of the proposed designations, clearly stating that Smoking in a Unit which is designated as a nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and inviting comments on the proposed designations of nonsmoking Units within the requisite timeline;

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units; and

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

COMMENT: This subsection requires Landlords to provide tenants notice of proposed nonsmoking designations before the designations are final. The intent is to allow tenants to provide comments to the Landlord so that the Landlord can accommodate tenant wishes, if possible. Note, however, that the Landlord is not obligated to make changes based on tenants' comments. Existing law prohibits a Landlord from making designations adverse to a tenant's interests for a discriminatory or other illegal purpose.

A copy of this ordinance is required to accompany the notice of a nonsmoking Unit designation so that tenants may asses for themselves their full rights and obligations. Alternatively, the ordinance can be reworded so that a summary of tenants' rights and obligations is required 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.

(5) A Landlord may modify the proposed designations based upon comments received from tenants.

(6) At least thirty (30) days before submitting the final designations of nonsmoking Units required by subsection (3) above, the Landlord shall provide all tenants written notice of the final designations clearly stating that Smoking in a designated nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and a copy of the final documents that will be submitted pursuant to Section [___ (*10)] of this [article / chapter]. These final designations may differ from the proposed designations on which tenants were invited to comment.

(7) A Unit in a Rental Complex for which a Landlord is required to submit information pursuant to Section [___ (*10)] of this [article / chapter] but for which such information, for any reason, is not fully and timely submitted is hereby designated as a nonsmoking Unit as of [*insert effective date of ordinance + 120 days*].

Sec. [____ (*7)]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND EXISTING UNITS IN RENTAL COMPLEXES.

COMMENT: This section requires that Smoking restrictions be included as part of the lease. 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, Landlords may enforce the Smoking restrictions just like any other condition in the lease, such as common provisions regarding noise, use of laundry facilities, and damage to common areas. Further, by including the "third-party beneficiary" provision, other tenants will be able to enforce a lease's Smoking restrictions. The Landlord and other tenants become an alternate enforcement authority for the Smoking restrictions in addition to possible local government enforcement of the law (see Section *12 Enforcement) and optional private citizen enforcement (see Section *13 Private Enforcement).

Note also that after a Landlord amends an existing rental agreement or enters into a new lease to include these required terms, Smoking in violation of those terms becomes illegal pursuant to Section *9, and not just a material breach of the lease.

(a) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, 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 within one year after the effective date of ordinance

(assuming leases are for one year or less).

(b) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, 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 followed by an example clause based on 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.

(1) A clause providing that as of [*insert effective date of ordinance + one year*], it is a material breach of the agreement to allow or engage in Smoking in the Unit unless the Landlord has supplied written notice that the Unit has not been designated a nonsmoking Unit and no other prohibition against Smoking applies. 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 the unit as of [*insert effective date of ordinance + one year*] unless landlord has provided written notice that the unit has not been designated a nonsmoking unit and smoking in the unit is not otherwise prohibited by this agreement, other agreements, or by law."

(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 or present by invitation or permission of the tenant to engage in Smoking in any Common Area of the property 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 or present by invitation or permission 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 Rental Complex as to the Smoking provisions of the agreement. Such a clause might state, "Other occupants of the property are express third-party beneficiaries of those provisions in this agreement that concern smoking. As such, other occupants of the property may seek to 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 Rental Complex limited rights to enforce the Smoking restrictions in leases. Without the declaration, other residents usually have no 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 Rental Complex, 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 Rental Complex 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 *12 "Enforcement" provides for traditional enforcement by local government officials.

Section *13 "Private Enforcement" 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 Section *13 is included.

(e) This [article / chapter] shall not create additional liability in 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 Rental Complex if the Landlord has fully complied with this Section and Section [__(*6)].

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. [____ (*8)]. ADDITIONAL DUTIES OF A LANDLORD OF A RENTAL COMPLEX WITH LESS THAN ONE HUNDRED PERCENT (100%) NONSMOKING UNITS.

A Landlord of a Rental Complex with less than one hundred percent (100%) nonsmoking Units shall provide to every prospective tenant, prior to entering into a new lease or other rental agreement for the occupancy of a Unit in a Rental Complex, a copy of the designation documents submitted pursuant to Section [___ (*6)] describing each designated nonsmoking Unit with an accompanying diagram depicting the location of nonsmoking Units in relation to all other Units and any designated Smoking areas.

> **COMMENT:** This section requires the Landlord to notify prospective tenants of the location of nonsmoking Units to Units where Smoking may be permitted. It does not require the Landlord to inquire as to any tenant's personal Smoking habits. Instead, the Landlord merely identifies for prospective tenants which Units allow Smoking and which do not.
>
> If the community decides to make 100% of existing Units in Rental Complexes nonsmoking with no Landlord election, this Section can be omitted.

Sec. [____ (*9)]. SMOKING PROHIBITED BY LAW IN CERTAIN AREAS.

> **COMMENT:** This section consolidates the actual Smoking prohibitions. Rather than state that Smoking is prohibited numerous times in various sections of the ordinance, those sections simply refer the reader to this Section *9. One benefit of consolidation is a uniformity of the Smoking prohibitions between sections.

(a) Smoking in a Common Area, on or after [*insert effective date of ordinance*], other than in a designated Smoking area established pursuant to Section [___ (*2)], is a violation of this [article / chapter].

(b) Smoking in a New Unit, on or after [*insert effective date of ordinance*], is a violation of this [article / chapter].

(c) Smoking in a designated nonsmoking Unit, on or after [*insert effective date of ordinance* + *1 year*], is a violation of this [article / chapter].

(d) No Person shall engage in Smoking in any Nonsmoking Area.

> **COMMENT:** Note that whenever a lease contains a no- Smoking term, this provision makes Smoking in such a Unit *against the law* in addition to being a violation of the lease. This provision also applies to any nonsmoking rules or CC&Rs for a Common Interest Complex.
>
> Thus, when a Landlord amends an existing rental agreement or creates a new one to include the lease terms required by Section

*7, Smoking in violation of those lease terms then becomes illegal, not just a lease violation.

(e) No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area, except as provided in Section [___ (*7)(e)].

COMMENT: This provision makes Smoking in a nonsmoking area or Unit against the law, even if an area is made nonsmoking only by a lease term (rather than an ordinance, for example). It also makes a tenant responsible for Smoking by his or her guests. The exception refers back to the subsection limiting a Landlord's liability for a tenant's breach of a no-smoking term.

Sec. [____ (*10)]. PROCEDURES AND REQUIREMENTS FOR MANDATED SUBMISSIONS.

(a) Submissions required by this [article / chapter] must be received by [*insert the municipal office or official who will administer the record-keeping requirements of the ordinance*] on or before any applicable due date. The submissions shall include all material and information required by this [article / chapter] and such other materials and information as [*insert the designated municipal office or official*] deems necessary for the administration and enforcement of this [article / chapter].

COMMENT: The community should fill in the blanks with the appropriate office, official, or department that can accommodate the record-keeping requirements of this ordinance and that can handle the anticipated requests from the public for access to the information. Communities will likely differ as to which department is best suited to fill this role.

(b) All material and information submitted pursuant to this [article / chapter] constitute disclosable public records and are not private or confidential.

Sec. [____ (*11)]. 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 other provisions 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 to 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 (c) below does potentially expand

traditional nuisance law.

(b) Notwithstanding any other provision of this [article / chapter], Smoking marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* is not prohibited by this [article / chapter].

(c) 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 (c) 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 then to prove 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. [____ (*12)]. 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 in any given case. As a practical matter, 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 also may enforce this chapter.

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed $100 for a first infraction. (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 *11(c) 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 for injunctive relief to prevent future such violations or sue to recover such actual or statutory damages as he or she may prove.]

> **COMMENT:** If Section *13 "Private Enforcement" is not included, consider including this simple provision, which provides a far more limited type of private enforcement. If Section *13 is included, this provision should be omitted.

[(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.

Sec. [____ (*13)]. PRIVATE ENFORCEMENT.

> **COMMENT:** This "Private Enforcement" provision makes it possible for any member of the public to sue violators of this ordinance. This "private right of action" section provides an avenue for private persons to file suit. Such a right was curtailed after the passage of Proposition 64 in November 2004, which prohibited the use of California Business and Professions Code section 17200 by private persons to file suits on behalf of the public. However, nothing in Proposition 64 prohibits local governments from creating a private right of action to enforce violations of local law.

Note that although this section is titled "Private Enforcement," the city or county itself can also use these provisions if it deems them preferable to other enforcement options or if it seeks to impose additional sanctions.

For further explanation of the rationale behind and potential impact of this provision, please see TALC's memorandum entitled "The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances" available from our website at www.phlpnet.org/tobacco-control.

If this "Private Enforcement" provision is not included, consider including the optional language in Section *12(h).

(a) Any Person, including a legal entity or organization or a government agency, acting for the interests of itself, its members, or the general public may bring a civil action to enforce this [article / chapter]. Upon proof of a violation, a court shall award the following:

COMMENT: This provision allows a Person to sue a violator if the Person has been personally harmed or if the Person wants to act as a private attorney general by holding the violator accountable on behalf of the general public.

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, $[500] for each violation of this [article / chapter] (hereinafter "Statutory Damages"). Each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this [article / chapter], no Person suing on behalf of the general public shall recover Statutory Damages based upon a violation of this [article / chapter] if a previous claim brought on behalf of the general public by another Person for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Person bringing the subsequent claim was a party to the prior adjudication.

COMMENT: This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages resulting from a given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation is a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below $5,000 (or $7,500 if the small claims suit is brought by a natural person). So, when considering the amount at which to set statutory damages, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than $5,000 (or $7,500). Note that this provision protects a person from being sued multiple times on behalf of the general public for the same violation and must do so to prevent the ordinance from being challenged as unconstitutionally punitive.

(2) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, retaliation, or a conscious disregard for the public health.

COMMENT: Exemplary damages are also known as *punitive damages*. They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(b) The Person may also bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

COMMENT: In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the former, the defendant is directly ordered to do something (or to refrain from doing something). With a conditional judgment, however, the defendant is given 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.

(c) Notwithstanding any legal or equitable bar against a Person seeking relief on its own behalf, a Person may bring an action to enforce this [article / chapter] solely on behalf of the general public. When a Person brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Person from bringing a subsequent action based upon the same facts but seeking relief on his, her or its own behalf.

COMMENT: This is an important clause, so exercise care when considering whether to modify or eliminate it. This clause accomplishes two distinct goals:
First, the clause permits a Person with a special relationship to a particular defendant to sue the defendant even though the Person might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as *legal and equitable bars*. For example, a tenant may be required to arbitrate—not litigate—any disputes, such as a dispute involving Smoking in a Multi-Unit Residence. Under this clause, a tenant may be required to arbitrate any *personal* claims (e.g., damages for personal injury from Smoke) but can nevertheless sue the tenant violating the ordinance in court as a representative member of the general public. In such a circumstance, the Person could only make the claims that *every* member of the general public could make (e.g., sue for Statutory Damages on behalf of the general public for a violation of this ordinance).

Second, the clause permits a Person who first sues *solely* on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms *res judicata, collateral estoppel*, or *issue or claim preclusion* for such

prohibitions. Under this clause, however, a tenant subjected to Smoking in a Multi-Unit Residence can first sue the tenant violating the ordinance solely on behalf of the general public, receiving the statutory damages amount for each violation. If the tenant is made ill by the Smoke, she can sue the violating tenant later for personal injury.

This clause is not intended to modify well-established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply reflects the reasoning that when a Person brings a claim *solely* on behalf of the general public, the plaintiff is acting as a private attorney general; thus, the existence of personal claims is irrelevant and such claims are unaffected.

(d) Nothing in this [article / chapter] prohibits a Person from bringing a civil action in small claims court to enforce this [article / chapter], so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of that court.

COMMENT: This clause is legally superfluous, but is serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

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 irrelevant.

public health law & policy
technical assistance legal center

Smokefree Housing Ordinance

A Model California Ordinance Regulating Smoking in Multi-Unit Residences (with Annotations)

Revised December 2009
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Developed by the Technical Assistance Legal Center (TALC),
a project of Public Health Law & Policy.

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Introduction

The Technical Assistance Legal Center (TALC) developed this Model Ordinance to help California cities and counties limit 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.

The Ordinance's comprehensive design limits exposure to secondhand smoke by restricting smoking in common areas (indoors and outdoors), creating smokefree buffer zones, and prohibiting smoking in individual units. Communities may choose to include some or all of the options offered in the Model Ordinance, depending on the jurisdictions' policy objectives. TALC can help adapt this Model Ordinance to meet an individual community's needs.

To assist cities and counties in creating smokefree multi-unit housing, this Model Ordinance includes:

- Extensive findings based on the latest scientific information documenting the health risks associated with tobacco use and exposure to secondhand smoke;
- Restrictions on 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;
- Smokefree buffer zones that can expand to include neighboring property and/or balconies and patios of adjacent units to limit drifting secondhand smoke from entering nonsmoking areas;
- Prohibitions on smoking inside the units of multi-unit residences, including apartments and condominiums;
- Recommended procedures for designating nonsmoking units by landlords and homeowners' associations; and
- Robust enforcement mechanisms including no-smoking lease terms and options for private individuals and organizations to enforce the smokefree housing provisions.

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 – as well as apartments and condominiums. Some of the comments in the Model Ordinance describe how to narrow the scope of the smoking restrictions, should that be necessary.

In addition, this Model Ordinance provides a step-by-step approach to designating nonsmoking units, including a recommended implementation process that allows tenants and landlords to become familiar with the new smoking restrictions over a 12-month period. Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair and effective approach – balancing public health needs against the potential inconvenience the ordinance puts on tenants who smoke and landlords who must implement the new policy.

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.

This Model Ordinance offers a variety of options. In some instances, blanks (e.g., [____]) prompt you to customize the language to fit your community's needs. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure that the ordinance is consistent with a community's existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

TALC has also developed other ordinances to create smokefree outdoor areas, such as parks, beaches, dining patios, and public events. If you would like to adopt a comprehensive or more customized approach, some aspects of other TALC ordinances can be combined with this ordinance. If you have questions about how to adapt this or other TALC ordinances 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 ____] 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.

The [City Council / County Board of Supervisors] of [____] hereby finds and declares as follows:

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

- Tobacco-related illness is the leading cause of preventable death in the United States,[1] accounting for about 443,000 deaths each year;[2] and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;[3] and
- Some of the most common types of cancers, including stomach, liver, uterine cervix, and kidney cancers, are related to tobacco use;[4] and

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

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;[5] and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;[6] and

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

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

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

[4] Leistikow B, Zubair K, et al. "Male Tobacco Smoke Load and Non-Lung Cancer Mortality Associations in Massachusetts." *BMC Cancer,* 8:341, 2008. Available at: www.biomedcentral.com/1471-2407/8/341.

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

[6] Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; *See* California Environmental Protection Agency, Air Resources Board. *News Release, California Identifies Secondhand*

- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;[7] and

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

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;[8] and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;[9] and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;[10] and exacerbates childhood asthma;[11] and

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;[12] and

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

- The total annual economic burden of smoking in the United States is $193 billion;[13] and
- From 2001-2004, the average annual health care expenditures attributable to smoking were approximately $96 billion;[14] and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over $10 billion per year in the United States in 2005;[15] and

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Smoke as a "Toxic Air Contaminant." Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

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

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

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

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

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

[12] 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.

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

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

[15] Behan DF, Eriksen MP and Lin, Y. *Economic Effects of Environmental Tobacco Smoke*. Schaumburg, IL: Society of

- 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;[16] and
- California's Tobacco Control Program saved the state and its residents $86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly;[17] and

WHEREAS, smoking is the primary cause of fire-related injuries and deaths in the home, as evidenced by the following:

- Cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States,[18] causing an estimated 142,900 smoking-related fires, 780 deaths, 1,600 injuries, and $606 million in direct property damage in 2006;[19] and
- One in four fatalities from home fires caused by smoking is NOT the smoker whose cigarette started the fire, and 25% of those deaths were of neighbors or friends of the smoker;[20] and
- Smoking in a residence where long-term oxygen therapy takes place is very dangerous as oxygen is a fire accelerant, and 27% of fatalities due to smoking during long-term oxygen therapy occurred in multifamily dwellings;[21] and
- The United States Fire Administration recommends that people smoke outdoors;[22] and

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

- Secondhand smoke can seep under doorways and through wall cracks;[23] and

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Actuaries, 2005, p. 2. Available at: www.soa.org/files/pdf/ETSReportFinalDraft(Final%203).pdf.

[16] 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.

[17] Lightwood JM, Dinno A and Glantz SA. "Effect of the California Tobacco Control Program on Personal Health Care Expenditures." *PLoS Med,* 5(8): e178, 2008. Available at: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050178.

[18] Leistikow B, Martin DC and Milano CE. "Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview." *Preventive Medicine,* 31: 91-99, 2000. Available at: http://leistikow.ucdavis.edu/SmokingFires.pdf.

[19] Hall JR. *U.S. Smoking-Material Fire Problem*. Quincy, MA: National Fire Protection Association, 2008, p. vii. Available at: www.nfpa.org/assets/files//PDF/OS.Smoking.pdf. (Factsheet available at: www.nfpa.org/assets/files//PDF/smokingfactsheet.pdf.)

[20] Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis*. US Department of Homeland Security, 2006, p. 17. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

[21] US Department of Health and Human Services, Centers for Disease Control and Prevention. "Fatal Fires Associated with Smoking During Long-Term Oxygen Therapy – Maine, Massachusetts, New Hampshire, and Oklahoma, 2000 – 2007." *Morbidity and Mortality Weekly Report,* 57(31): 852-854, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5731a3.htm?s_cid=mm5731a3_e.

[22] Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis*. US Department of Homeland Security, 2006, p. 19. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

[23] Wagner J, Sullivan DP, Faulkner D, et al. "Environmental Tobacco Smoke Leakage from Smoking Rooms." *Journal of*

- Persons living in apartments near smokers can be exposed to elevated pollution levels for 24 hours a day, and at times, the particulate matter exposure can exceed the U.S. Environmental Protection Agency's 24-Hour Health Based Standard;[24] and
- 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;[25] and

WHEREAS, most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- Nearly 87% of Californians and 91% of California women are nonsmokers;[26] and
- 74% of Californians surveyed approve of apartment complexes requiring at least half of rental units be nonsmoking;[27] and
- 69% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings and 78% support laws that create nonsmoking units;[28] and
- 62% of California renters feel that there is a need for laws to limit smoking in apartments;[29] 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;[30] and

WHEREAS, there is no Constitutional right to smoke;[31] and

Occupational and Environmental Hygiene, 1: 110-118, 2004. Available at: http://eetd.lbl.gov/IEP/pdf/LBNL-51010.pdf.

[24] Klepeis N. *Measuring the Seepage of Tobacco Smoke Particles Between Apartment Units.* California's Clean Air Project, 2008. Available at: www.phlpnet.org/sites/phlpnet.org/files/CCAP_Measuring_the_Seepage_Klepeis_article.pdf.

[25] 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.* 2006, p. 11. Available at: www.cdc.gov/tobacco/data_statistics/sgr/sgr_2006/index.htm#full.

[26] California Department of Health Services. *News Release, New Data Show 91 Percent of California Women Don't Smoke.* 2007. Available at: www.applications.dhs.ca.gov/pressreleases/store/PressReleases/07-37%20dhs%20smoking%20rates-with%20charts.html.

[27] Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure.* 2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

[28] Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure..*2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

[29] American Lung Association of California, Center for Tobacco Policy and Organizing. *Statewide Apartment Renter Study*. 2004. Available at: www.center4tobaccopolicy.org/_files/_files/5242_Center%20Renter%20Survey%20Results%20May%202004.pdf (A survey of apartment residents throughout California).

[30] Cal. Legislative Counsel Op., 21547, *Secondhand Smoke in Multi-Unit Housing (Apartments & Condos) Smoking Bans: Residential Rental Property*, (September 23, 1999). Highlights available at: www.respect-ala.org/drift_samsmokingbans.htm.

[31] Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke.* 2005. Available at: www.phlpnet.org/tobacco-control.

WHEREAS, California law prohibits smoking in virtually all indoor places of employment reflecting the state policy to protect against the dangers of exposure to secondhand smoke;[32] 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;[33] and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance;[34] 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 non-tobacco 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 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 / , but does not include property containing only residential structures].

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 *3 "Nonsmoking Buffer Zones").

Four options are available, listed below from the strongest to the weakest protections.

Option one—*Include Everything*: Include *all* adjoining property, public and private, by omitting all bracketed language. With this option, a smokefree buffer zone might encompass a portion of the backyard of a single-family residence.

Option two—*Include Everything but Single-Family Homes*: Include all adjoining property, public and private, *except* single-family residences by including only the single-underlined language.

Option three—*Include Everything but Residential Property*:

[32] Cal. Lab. Code § 6404.5 (West 2009).

[33] Cal. Civil Code § 3479 (West 2009).

[34] *In Re Jones*, 56 Cal.App.2d 658, 663 (1943); *See also* Cal. Const., art. XI, § 7 and Cal. Gov. Code § 38771 (West 2009).

Include all adjoining property, public and private, *except* residential property (e.g., single-family residences or Multi-Unit Residences) by including only the double-underlined language. This option still includes, for example, outdoor areas of businesses, parking lots, and some places not open to the general public such as members-only clubs

Option four—*Exclude Everything*: Do not include *any* adjoining property in the buffer zones, in which case the entire definition should be deleted.

(b) "Common Area" means every Enclosed Area or Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit of that Multi-Unit Residence are entitled to enter or use, including, for example, halls and paths, lobbies and courtyards, elevators and stairs, community rooms and playgrounds, gym facilities and swimming pools, parking garages and parking lots, shared restrooms, shared laundry rooms, shared cooking areas, and shared eating areas.

COMMENT: 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) "Common Interest Complex" means a Multi-Unit Residence that is a condominium project, [a community apartment project,] [a stock cooperative,] [or a planned development] as defined by California Civil Code section 1351.

COMMENT: This definition is used to distinguish owned multi-unit housing (e.g., condominiums and townhomes) from other types of Multi-Unit Residences, such as apartments that are leased, which are defined in the term "Rental Complex" (see below). The distinction between all types of Multi-Unit Residences and those that are owned is necessary if a community decides to regulate smoking in less than 100% of *existing* Units in Multi-Unit Residences (see Sections *5 and *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

The list of optional Common Interest Complexes includes other types of housing that, like condominiums, have covenants, conditions, and restrictions (CC&Rs) and are managed by a homeowners' association.

(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 vertical boundaries of any height whether or not those boundaries include vents or other openings; or

(2) [four (4)] walls or other vertical boundaries that exceed [six (6)] feet in height whether or not those boundaries include vents or other openings.

> **COMMENT:** The number of walls and the height threshold can be customized to meet the needs of your community, and changing these numbers will affect the scope of the ordinance. Reducing the number of walls in this definition would broaden the definition of Enclosed Area, which would result in narrowing the definition of Unenclosed Area. For the purposes of this ordinance, the distinction between "enclosed" and "unenclosed" is primarily relevant to establishing designated Smoking areas (see Section *2) and nonsmoking buffer zones (see Section *3).
>
> An area that is partially covered by anything would be analyzed under subparagraph (1), whereas only areas that are totally uncovered would be analyzed under subparagraph (2). It can be difficult to apply Labor Code section 6404.5 to areas that are surrounded by lattice, hedges, and other nonsolid structures. For purposes of this ordinance any vertical boundary, regardless of composition, constitutes an "other vertical boundary" for application of this definition.
>
> NOTE: If the Municipal Code already has Smoking restrictions, it may contain a definition of "enclosed." Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with the new definition.

(e) "Landlord" means any Person who owns property let for residential use, any Person who lets residential property, and any Person who manages such property, except that "Landlord" does not include a master tenant who sublets a Unit as long as the master tenant sublets only a single Unit of a Multi-Unit Residence.

> **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 [, except the following specifically excluded types of housing:

(1) a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2);
(2) a mobile home park;
(3) a campground;
(4) a marina or port;
(5) a single-family home;
(6) a single-family home with a detached or attached in-law or second unit when permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City / County] adopted pursuant to those sections; and
(7) ____].

> **COMMENT:** Because the definition of Unit in this ordinance is so broad and includes all types of dwelling places—from rooms in a hotel to tents at a campground—a community may want to limit

the types of dwelling places covered by the smokefree housing ordinance. The optional language provides examples of the types of exceptions that communities are likely to consider.

Note that the definition of Multi-Unit Residence without any exemptions would include the following types of dwelling places: apartments, condominium projects, townhomes, stock cooperatives, and co-housing; affordable housing (for seniors, for disabled tenants, for Section 8, etc.); long-term health care facilities, assisted living facilities, hospitals, and family support facilities; hotels, motels, single room occupancy ("SRO") facilities, dormitories, and homeless shelters; mobile home parks, campgrounds, marinas, and ports; single-family homes and single-family homes with an in-law unit.

(g) "New Unit" means a Unit that is issued a [certificate of occupancy / final inspection] more than 180 days after [*insert effective date of ordinance*] [and also means a Unit that is let for residential use for the first time more than 180 days after [*insert effective date of ordinance*]].

COMMENT: This definition is used to differentiate between Units that are already built 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, whereas Smoking could be allowed in some Units of existing multi-unit housing.

The definition incorporates a trigger date of 180 days after the ordinance takes effect so as to "grandfather" buildings already under construction.

The *certificate of occupancy* or *final inspection* is probably the most administrable way to distinguish between existing and New Units. However, a community could distinguish between Units for which land use entitlements have or have not issued or Units which 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 had previously never been rented, 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 of a Multi-Unit Residence in which Smoking is prohibited by: (1) this [chapter / article] or other law; (2) by binding agreement relating to the ownership, occupancy, or use of real property; or (3) by designation of a Person with legal control over the area. In the case of a Smoking prohibition 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 to engage in Smoking or to allow Smoking in that area unless: (1) the Person knows that Smoking is not permitted; or (2) a reasonable Person would know that Smoking is not permitted.

(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 the City and County.

(j) "Rental Complex" means a Multi-Unit Residence for which fifty percent (50%) or more of Units are let by or on behalf of the same Landlord.

> **COMMENT:** This definition is used to distinguish traditional rental housing (e.g., apartments, SROs) from other types of Multi-Unit Residences, such as condominiums that are owner-occupied. The distinction between all types of Multi-Unit Residences and those that are leased is necessary if a community decides to regulate smoking in less than 100% of *existing* Units in Multi-Unit Residences (see Section *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

(k) "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, marijuana smoke, and crack cocaine smoke.

> **COMMENT:** This is a special definition that is more limited than the common understanding of what "smoke" is. For example, smoke from a fireplace or a barbeque grill is not "Smoke" for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhaling it. The limitation placed on "Smoke" by this definition is important to avoid unintended consequences, such as inadvertently prohibiting the burning of incense or use of barbeque grills.
>
> This definition includes e-cigarettes. It also marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

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

> **COMMENT:** This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

(m) "Unenclosed Area" means any area that is not an Enclosed Area.

(n) "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 long-term health care facility, assisted living facility, or hospital; a hotel or motel room; a room in a single room occupancy ("SRO") facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit. Unit includes a New Unit.

> **COMMENT:** This definition is intentionally extremely broad. It is designed to capture all conceivable "dwelling spaces" as the examples illustrate. However, because of the way that this model ordinance is designed, any limitations on the types of housing covered by the ordinance should be added to the defined term "Multi-Unit Residence" and *not* here. For example, some "mobile homes" in mobile home parks may be included in this definition and even cited in the examples but, nevertheless, "mobile homes" can be specifically excluded from the ordinance under the definition of "Multi-Unit Residence."

Sec. [____ (*2)]. 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 is prohibited in all Common Areas pursuant to Section [___ (*9)] except that 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 that at all times the designated Smoking area complies with paragraph (b) below.

(b) A designated Smoking area:

(1) Must be an Unenclosed Area.

(2) Must be located at least twenty-five (25) feet from any Enclosed Area that is a Nonsmoking Area. A Person with legal control over a Common Area in which a designated Smoking area has been designated shall modify, relocate or eliminate that designated Smoking area so as to maintain compliance with the requirements of this subsection (b) as laws change, as binding agreements are created, and as Nonsmoking Areas on neighboring property are established.

> **COMMENT:** This clause limits where a designated Smoking area can be located in order to prevent drifting Smoke from entering smokefree areas. As written, it includes areas on neighboring property that are designated as nonsmoking by contract (e.g., a smokefree lease term for a rental unit next to, but not part of, the Multi-Unit Residence) and areas on neighboring property

designated by a property owner or lessee as nonsmoking (e.g., a neighboring business or homeowner).

(3) 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.

(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.

(c) 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.

(d) Clear and unambiguous "No Smoking" signs shall be posted in sufficient numbers and locations to make Common Areas where Smoking is prohibited by this [article / chapter] or other law obvious to a reasonable person. The signs shall have letters of no less than one inch in height or contain the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle crossed by a red bar). 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].

Sec. [____ (*3)]. NONSMOKING BUFFER ZONES.

(a) Smoking is prohibited in Unenclosed Areas of Multi-Unit Residence, including balconies, porches, decks, and patios, within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.

COMMENT: This section addresses the problem of Smoking so close to a "nonsmoking" area that Smoke easily drifts into it. This restriction even applies to Smoking on exclusive-use balconies, porches, decks, and patios of Units where Smoking would otherwise be allowed, *if* these areas are within 25 feet of a nonsmoking Unit. A community can make *all* exclusive-use outdoor areas nonsmoking. To do so, include the optional subsection (d) below.

[(b) Smoking is prohibited in Unenclosed Areas of Adjacent Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.]

COMMENT: To create the most comprehensive smokefree buffer zone, include this option. This subsection 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 selecting a version of the "Adjacent Property" definition

to exempt certain types of neighboring property, such as property containing detached single-family homes, while still prohibiting Smoking on other private property, such as bar patios and loading docks. If this option is not included in your community's ordinance, the defined term "Adjacent Property" in Section *1 should be deleted.

[(c) Subsections (a) and (b) above do 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 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 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.

[(d) Notwithstanding any other provision of this [article / chapter], Smoking is prohibited in all exclusive-use Unenclosed Areas associated with a Unit, such as, for example, a private balcony, porch, deck, or patio.]

COMMENT: This optional subsection prohibits Smoking in *all* exclusive-use outdoor areas that are associated with a Unit even if Smoking is permitted within the Unit (i.e., it is not a designated nonsmoking Unit). By doing so, this subsection unambiguously addresses the problem of Smoke drifting from the balcony or patio of one Unit into a neighboring Unit, a top complaint from residents living in multi-family housing. On the other hand, it might have the effect of leading people to increase their Smoking in the Unit, despite public health and fire safety advice to only engage in Smoking outside.

Sec. [____ (*4)]. SMOKING RESTRICTIONS IN NEW UNITS OF MULTI-UNIT RESIDENCES.

(a) All New Units of a Multi-Unit Residence are hereby designated nonsmoking Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio; and including without limitation New Units in a Rental Complex and New Units in a Common Interest Complex.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

COMMENT: As written, this section applies to *all* New Units of a Multi-Unit Residence. While the percentage of nonsmoking New Units required is a policy choice and may be modified, 100% nonsmoking Units is recommended. If your community chooses to require a lesser percentage, substitute the following provision:

(a) Up to one hundred percent (100%), but no less than [ninety percent (90%)], of New Units of a Multi-Unit Residence, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units by the Person or Persons causing the construction of the New Units.

*(b) Smoking in a designated nonsmoking Unit shall be a violation of this [article / chapter] as provided in Section [___ (*9)].*

(c) Designated nonsmoking Units shall not share a ventilation system with a Unit in which Smoking may be allowed. To the maximum extent practicable, nonsmoking Units shall be grouped together vertically and horizontally and physically separated from Units where Smoking may be allowed. Where possible, all units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

*(d) The designations required by subsection (a) above shall be permanent; shall be submitted in accordance with Section [___ (*10)]; and shall be submitted by the Person who controls the Multi-Unit Residence in which the New Unit is located prior to any sale or lease of a New Unit and before a New Unit is occupied. The submitted designations must contain a description of each designated nonsmoking Unit sufficient to identify the Unit and must be accompanied by a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.*

Sec. [____ (*5)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A COMMON INTEREST COMPLEX.

COMMENT: This subsection prohibits Smoking inside *all* existing Units in a Common Interest Complex, such as condominiums, but provides an opportunity for the homeowners' association to hold an election to allow Smoking in some of the existing Units. A potential incentive for a Common Interest Complex to establish 100% nonsmoking Units is that *no action* is required to set this standard. Action is only required if the Common Interest Complex wishes to "opt out" of the 100% default established in subsection (a).

If your community wants to prohibit Smoking in *all* existing Units of Common Interest Complexes regardless of owner preferences, omit subsection (c) and the reference to it in subsection (a) ("*provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below.*"). On the other hand, if your community wants to regulate *only* Rental Complexes and not Common Interest Complexes, delete this entire Section (*5).

(a) All Units of a Common Interest Complex 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, are hereby designated nonsmoking Units as of [*insert effective date of*

ordinance + *1 year*]; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

(c) By a vote of the membership as provided in subsection (1) below, a Common Interest Complex may choose to designate fewer than one-hundred percent (100%) of existing Units as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (4) below. Otherwise subsection (a) above shall apply.

(1) A vote by the membership on the threshold question of allowing less than one hundred percent (100%) of Units to be designated nonsmoking Units must take place before [*insert effective date of ordinance* + *270 days*].

> **COMMENT:** The recommended timeframe of 270 days (or nine months) is suggested as a reasonable amount of time to organize and hold the homeowners' association election while adhering to the legally required guidelines.

(2) Up to one hundred percent (100%), but no less than [eighty percent (80%)], of Units that are not New Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units.

(3) Where possible, best efforts shall be made to group nonsmoking Units together, both horizontally and vertically, and physically separate them from Units where Smoking may be allowed.

(4) No later than [*insert effective date of ordinance* + *1 year*] the final designations must be made and the following must be submitted in accordance with Section [___ (*10)]:

(i) a description of each designated nonsmoking Unit sufficient to readily identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

Sec. [____ (*6)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A RENTAL COMPLEX.

> **COMMENT:** This subsection prohibits Smoking inside *all* existing Units in a Rental Complex, but provides an opportunity for a Landlord to allow Smoking in some of the existing Units. A potential incentive for a Landlord to establish 100% nonsmoking Units is that only *limited action* is required by a Landlord to set this standard. Substantial action is required if the Landlord wishes to "opt out" of the 100% default established in subsection (a).
>
> If your community wants to prohibit Smoking in *all* existing Units

of Multi-Unit Residences regardless of Landlord preference, omit subsection (d) entirely and all references to subsection (d) in subsections (a)–(c).

(a) All Units of a Rental Complex 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, are hereby designated nonsmoking Units as of [*insert effective date of ordinance + 120 days*]; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Landlord fully complies with subsection (d) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

(c) Except if a Landlord fully complies with subsection (d) below, at least sixty (60) days before [*insert effective date of ordinance + 120 days*], the Landlord shall provide each tenant with:

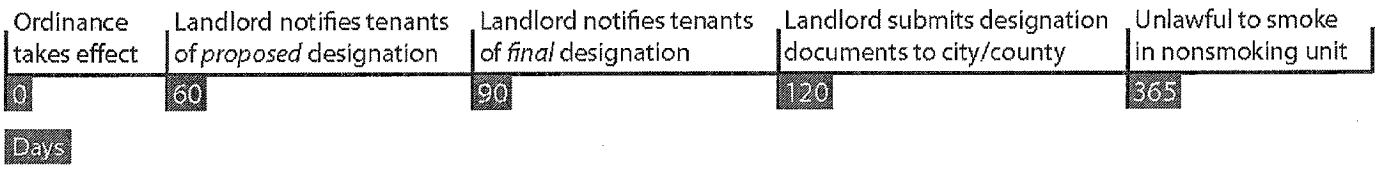
(1) a written notice clearly stating that all Units, including the tenant's Unit, are designated nonsmoking Units and that Smoking in a Unit will be illegal as of [*insert date specified in Sec. *9(c)*]; and

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

(d) A Landlord may choose to designate fewer than one-hundred percent (100%) of existing Units that are not New Units of a Rental Complex as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (7) below. However, subsection (a) above shall apply whenever a Landlord takes no action or only partially complies with the requirements of this subsection.

COMMENT: This subsection provides a step-by-step approach to designating nonsmoking and Smoking-allowed Units in Rental Complexes. This ordinance contains a recommended implementation process that allows tenants and Landlords to become familiar with the new Smoking restrictions over a 12-month period. Here is a timeline illustrating the implementation schedule:

Timeline to Designate Nonsmoking Units



Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair approach—balancing public health needs against the potential inconvenience the ordinance puts on Smoking tenants and Landlords who must implement the new policy. For legal

reasons, a *12-month* phase-in period strikes a good balance between the potential legal rights of tenants under existing agreements and the legal authority of Landlords to modify those agreements as this ordinance requires.

Your community may want to provide additional recommendations or guidelines for Landlords on what other steps a Landlord might want to take when designating nonsmoking Units. These could include conducting a tenant survey to determine who would like to live in a nonsmoking Unit, holding a house meeting to discuss the new policy, and/or hosting cessation classes for tenants.

Alternative approaches to the 12-month phase-in period could include multiple-year phase-in periods based on tenant turnover, waivers to smokers who request them, and permanent grandfathering. A 12-month phase-in approach, however, is a more effective strategy. Please contact TALC for assistance if an alternative to the phase-in period is desired.

(1) The Landlord shall permanently designate up to one hundred percent (100%) of Units, but no less than [eighty percent (80%)] of Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, as nonsmoking Units by the Landlord.

(2) To the maximum extent practicable, nonsmoking Units must be grouped together both horizontally and vertically and physically separated from Units where Smoking may be allowed. Where possible all Units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

(3) No later than [*insert effective date of ordinance* + *120 days*] a Landlord who chooses to designate fewer than 100% of the Units of a Multi-Unit Residences as nonsmoking shall submit the following in accordance with Section [___ (*10)]:

(i) a description of each designated nonsmoking Unit sufficient to identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

(4) At least sixty (60) days before submitting the nonsmoking Unit designations required by subsection (3) above, the Landlord shall provide each tenant with:

(i) a written notice of the proposed designations, clearly stating that Smoking in a Unit which is designated as a nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and inviting comments on the proposed designations of nonsmoking Units within the requisite timeline;

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units; and

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

COMMENT: This subsection requires Landlords to provide tenants notice of proposed nonsmoking designations before the designations are final. The intent is to allow tenants to provide comments to the Landlord so that the Landlord can accommodate tenant wishes, if possible. Note, however, that the Landlord is not obligated to make changes based on tenants' comments. Existing law prohibits a Landlord from making designations adverse to a tenant's interests for a discriminatory or other illegal purpose.

A copy of this ordinance is required to accompany the notice of a nonsmoking Unit designation so that tenants may asses for themselves their full rights and obligations. Alternatively, the ordinance can be reworded so that a summary of tenants' rights and obligations is required 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.

(5) A Landlord may modify the proposed designations based upon comments received from tenants.

(6) At least thirty (30) days before submitting the final designations of nonsmoking Units required by subsection (3) above, the Landlord shall provide all tenants written notice of the final designations clearly stating that Smoking in a designated nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and a copy of the final documents that will be submitted pursuant to Section [___ (*10)] of this [article / chapter]. These final designations may differ from the proposed designations on which tenants were invited to comment.

(7) A Unit in a Rental Complex for which a Landlord is required to submit information pursuant to Section [___ (*10)] of this [article / chapter] but for which such information, for any reason, is not fully and timely submitted is hereby designated as a nonsmoking Unit as of [*insert effective date of ordinance + 120 days*].

Sec. [____ (*7)]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND EXISTING UNITS IN RENTAL COMPLEXES.

COMMENT: This section requires that Smoking restrictions be included as part of the lease. 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, Landlords may enforce the Smoking restrictions just like any other condition in the lease, such as common provisions regarding noise, use of laundry facilities, and damage to common areas. Further, by including the "third-party beneficiary" provision, other tenants will be able to enforce a lease's Smoking restrictions. The Landlord and other tenants become an alternate enforcement authority for the Smoking restrictions in addition to possible local government enforcement of the law (see Section *12 Enforcement) and optional private citizen enforcement (see Section *13 Private Enforcement).

Note also that after a Landlord amends an existing rental agreement or enters into a new lease to include these required terms, Smoking in violation of those terms becomes illegal pursuant to Section *9, and not just a material breach of the lease.

(a) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, 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 within one year after the effective date of ordinance (assuming leases are for one year or less).

(b) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, 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 followed by an example clause based on 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.

(1) A clause providing that as of [*insert effective date of ordinance* + *one year*], it is a material breach of the agreement to allow or engage in Smoking in the Unit unless the Landlord has supplied written notice that the Unit has not been designated a nonsmoking Unit and no other prohibition against Smoking applies. 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 the unit as of [*insert effective date of ordinance* + *one year*] unless landlord has provided written notice that the unit has not been designated a nonsmoking unit and smoking in the unit is not otherwise prohibited by this agreement, other agreements, or by law."

(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 or present by invitation or permission of the tenant to engage in Smoking in any Common Area of the property 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 or present by invitation or permission 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 Rental Complex as to the Smoking provisions of the agreement. Such a clause might state, "Other occupants of the property are express third-party beneficiaries of those provisions in this agreement that concern smoking. As such, other occupants of the property may seek to 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 Rental Complex limited rights to enforce the Smoking restrictions in leases. Without the declaration, other residents usually have no 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 Rental Complex, 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 Rental Complex 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 *12 "Enforcement" provides for traditional enforcement by local government officials.
>
> Section *13 "Private Enforcement" 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 Section *13 is included.

(e) This [article / chapter] shall not create additional liability in 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 Rental Complex if the Landlord has fully complied with this Section and Section [__(*6)].

> **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. [____ (*8)]. ADDITIONAL DUTIES OF A LANDLORD OF A RENTAL COMPLEX WITH LESS THAN ONE HUNDRED PERCENT (100%) NONSMOKING UNITS.

A Landlord of a Rental Complex with less than one hundred percent (100%) nonsmoking Units shall provide to every prospective tenant, prior to entering into a new lease or other rental agreement for the occupancy of a Unit in a Rental Complex, a copy of the designation documents submitted pursuant to Section [___ (*6)] describing each designated nonsmoking Unit with an accompanying diagram depicting the location of nonsmoking Units in relation to all other Units and any designated Smoking areas.

> **COMMENT:** This section requires the Landlord to notify prospective tenants of the location of nonsmoking Units to Units where Smoking may be permitted. It does not require the Landlord to inquire as to any tenant's personal Smoking habits. Instead, the Landlord merely identifies for prospective tenants which Units allow Smoking and which do not.
>
> If the community decides to make 100% of existing Units in Rental Complexes nonsmoking with no Landlord election, this Section can be omitted.

Sec. [____ (*9)]. SMOKING PROHIBITED BY LAW IN CERTAIN AREAS.

> **COMMENT:** This section consolidates the actual Smoking prohibitions. Rather than state that Smoking is prohibited numerous times in various sections of the ordinance, those sections simply refer the reader to this Section *9. One benefit of consolidation is a uniformity of the Smoking prohibitions between sections.

(a) Smoking in a Common Area, on or after [*insert effective date of ordinance*], other than in a designated Smoking area established pursuant to Section [___ (*2)], is a violation of this [article / chapter].

(b) Smoking in a New Unit, on or after [*insert effective date of ordinance*], is a violation of this [article / chapter].

(c) Smoking in a designated nonsmoking Unit, on or after [*insert effective date of ordinance + 1 year*], is a violation of this [article / chapter].

(d) No Person shall engage in Smoking in any Nonsmoking Area.

> **COMMENT:** Note that whenever a lease contains a no- Smoking term, this provision makes Smoking in such a Unit *against the law* in addition to being a violation of the lease. This provision also applies to any nonsmoking rules or CC&Rs for a Common Interest Complex.
>
> Thus, when a Landlord amends an existing rental agreement or creates a new one to include the lease terms required by Section *7, Smoking in violation of those lease terms then becomes illegal, not just a lease violation.

(e) No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area, except as provided in Section [___ (*7)(e)].

> **COMMENT:** This provision makes Smoking in a nonsmoking area or Unit against the law, even if an area is made nonsmoking only by a lease term (rather than an ordinance, for example). It also makes a tenant responsible for Smoking by his or her guests. The exception refers back to the subsection limiting a Landlord's liability for a tenant's breach of a no-smoking term.

Sec. [____ (*10)]. PROCEDURES AND REQUIREMENTS FOR MANDATED SUBMISSIONS.

(a) Submissions required by this [article / chapter] must be received by [*insert the municipal office or official who will administer the record-keeping requirements of the ordinance*] on or before any applicable due date. The submissions shall include all material and information required by this [article / chapter] and such other materials and information as [*insert the designated municipal office or official*] deems necessary for the administration and enforcement of this [article / chapter].

> **COMMENT:** The community should fill in the blanks with the appropriate office, official, or department that can accommodate the record-keeping requirements of this ordinance and that can handle the anticipated requests from the public for access to the information. Communities will likely differ as to which department is best suited to fill this role.

(b) All material and information submitted pursuant to this [article / chapter] constitute disclosable public records and are not private or confidential.

Sec. [____ (*11)]. 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 other provisions 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 to 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 (c) below does potentially expand traditional nuisance law.

(b) Notwithstanding any other provision of this [article / chapter], Smoking marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* is not prohibited by this [article / chapter].

(c) 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 (c) 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 then to prove 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. [____ (*12)]. 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 in any given case. As a practical matter, 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 also may enforce this chapter.

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed $100 for a first infraction. (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 *11(c) 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 for injunctive relief to prevent future such violations or sue to recover such actual or statutory damages as he or she may prove.]

COMMENT: If Section *13 "Private Enforcement" is not included, consider including this simple provision, which provides a far more limited type of private enforcement. If Section *13 is included, this provision should be omitted.

[(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.

Sec. [____ (*13)]. PRIVATE ENFORCEMENT.

> **COMMENT:** This "Private Enforcement" provision makes it possible for any member of the public to sue violators of this ordinance. This "private right of action" section provides an avenue for private persons to file suit. Such a right was curtailed after the passage of Proposition 64 in November 2004, which prohibited the use of California Business and Professions Code section 17200 by private persons to file suits on behalf of the public. However, nothing in Proposition 64 prohibits local governments from creating a private right of action to enforce violations of local law.
>
> Note that although this section is titled "Private Enforcement," the city or county itself can also use these provisions if it deems them preferable to other enforcement options or if it seeks to impose additional sanctions.
>
> For further explanation of the rationale behind and potential impact of this provision, please see TALC's memorandum entitled "The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances" available from our website at www.phlpnet.org/tobacco-control.
>
> If this "Private Enforcement" provision is not included, consider including the optional language in Section *12(h).

(a) Any Person, including a legal entity or organization or a government agency, acting for the interests of itself, its members, or the general public may bring a civil action to enforce this [article / chapter]. Upon proof of a violation, a court shall award the following:

> **COMMENT:** This provision allows a Person to sue a violator if the Person has been personally harmed or if the Person wants to act as a private attorney general by holding the violator accountable on behalf of the general public.

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, $[500] for each violation of this [article / chapter] (hereinafter "Statutory Damages"). Each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this [article / chapter], no Person suing on behalf of the general public shall recover Statutory Damages based upon a violation of this [article / chapter] if a previous claim brought on behalf of

the general public by another Person for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Person bringing the subsequent claim was a party to the prior adjudication.

> **COMMENT:** This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages resulting from a given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation is a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below $5,000 (or $7,500 if the small claims suit is brought by a natural person). So, when considering the amount at which to set statutory damages, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than $5,000 (or $7,500). Note that this provision protects a person from being sued multiple times on behalf of the general public for the same violation and must do so to prevent the ordinance from being challenged as unconstitutionally punitive.

(2) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, retaliation, or a conscious disregard for the public health.

> **COMMENT:** Exemplary damages are also known as *punitive damages*. They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(b) The Person may also bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

> **COMMENT:** In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the former, the defendant is directly ordered to do something (or to refrain from doing something). With a conditional judgment, however, the defendant is given 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.

(c) Notwithstanding any legal or equitable bar against a Person seeking relief on its own behalf, a Person may bring an action to enforce this [article / chapter] solely on behalf of the general public. When a Person brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Person from bringing a subsequent action based upon the same facts but seeking relief on his, her or its own behalf.

> **COMMENT:** This is an important clause, so exercise care when

considering whether to modify or eliminate it. This clause accomplishes two distinct goals:
First, the clause permits a Person with a special relationship to a particular defendant to sue the defendant even though the Person might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as *legal and equitable bars*. For example, a tenant may be required to arbitrate—not litigate—any disputes, such as a dispute involving Smoking in a Multi-Unit Residence. Under this clause, a tenant may be required to arbitrate any *personal* claims (e.g., damages for personal injury from Smoke) but can nevertheless sue the tenant violating the ordinance in court as a representative member of the general public. In such a circumstance, the Person could only make the claims that *every* member of the general public could make (e.g., sue for Statutory Damages on behalf of the general public for a violation of this ordinance).

Second, the clause permits a Person who first sues *solely* on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms *res judicata, collateral estoppel*, or *issue or claim preclusion* for such prohibitions. Under this clause, however, a tenant subjected to Smoking in a Multi-Unit Residence can first sue the tenant violating the ordinance solely on behalf of the general public, receiving the statutory damages amount for each violation. If the tenant is made ill by the Smoke, she can sue the violating tenant later for personal injury.

This clause is not intended to modify well-established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply reflects the reasoning that when a Person brings a claim *solely* on behalf of the general public, the plaintiff is acting as a private attorney general; thus, the existence of personal claims is irrelevant and such claims are unaffected.

(d) Nothing in this [article / chapter] prohibits a Person from bringing a civil action in small claims court to enforce this [article / chapter], so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of that court.

COMMENT: This clause is legally superfluous, but is serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

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 irrelevant.