

This draft was modified by Ira Sharenow on November 2, 2007. My draft is based on the TALC draft. I deleted their valuable comments. Please see their drafts for comments which explain many of the provisions.

I did not insert "Albany" in all places where it is needed and did not make many of the other needed editions.

http://talc.phlaw.org/pubs/publications.php?choice=new_browse&search=188#

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Comprehensive Secondhand Smoke Model Ordinance for California Communities (with Annotations)

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AN ORDINANCE OF THE CITY OF Albany PROHIBITING THE USE OF TOBACCO PRODUCTS IN OR AROUND WORKPLACES AND PUBLIC PLACES AND AMENDING THE [____] MUNICIPAL CODE

The City Council of the City of Albany does ordain as follows:

SECTION I. FINDINGS.

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

WHEREAS, scientific studies have concluded that cigarette smoking causes chronic lung disease, coronary heart disease, stroke, cancer of the lungs, larynx, esophagus, mouth, and bladder, and contributes to cancer of the cervix, pancreas, and kidneys;¹ and

WHEREAS, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;² and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide;³ and

WHEREAS, the U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and neither separating smokers from nonsmokers nor installing ventilation systems effectively eliminates secondhand smoke;⁴ and

WHEREAS, the United States Environmental Protection Agency (EPA) has found secondhand smoke to be a risk to public health, and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen;⁵ and

¹ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshaag.pdf> (last accessed August 15, 2003).

² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Highlights Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999* (2002) MORBIDITY AND MORTALITY WEEKLY REPORT, available at http://www.cdc.gov/tobacco/research_data/economics/mmwr5114.highlights.htm (last accessed August 15, 2003).

³ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Reducing Tobacco Use: A Report of the Surgeon General*, 437 (2001).

⁴ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/chapter1.pdf> (last accessed Sept. 19, 2006).

⁵ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_clean.htm (last accessed Apr. 23, 2003).

WHEREAS, the California 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;⁶ and

WHEREAS, the California Office of Environmental Health Hazard Assessment 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;⁷ and

WHEREAS, exposure to secondhand smoke is the third leading cause of preventable death in this country, killing over 52,000 non-smokers each year,⁸ including 3,000 deaths from lung cancer;⁹ and

WHEREAS, 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;¹⁰ and

WHEREAS, secondhand smoke exposure causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis,¹¹ exacerbates childhood asthma, and increases the risk of acute chronic middle ear infection in children;¹² and

WHEREAS, the total cost of smoking in California was estimated to be \$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;¹³ and

⁶ Cal. Air Resources Bd., Resolution 06-01, at 5 (Jan. 26, 2006), available at <http://www.arb.ca.gov/regact/ets2006/res0601.pdf> (last accessed Sept. 19, 2006).

⁷ Cal. Env'tl. Prot. Agency, Office of Env'tl. Health Hazard Assessment, *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity* 17, (Aug. 11, 2006), available at http://www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf (last accessed Sept. 19, 2006).

⁸ S.A. Glantz & W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83(1) *Circulation* 1 (1991) and California Environmental Protection Agency, Office of Env'tl. Health Hazard Management, *Health Effects of Exposure to Environmental Tobacco Smoke: Final Report* (1997).

⁹ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshaag.pdf> (last accessed August 15, 2003).

¹⁰ Cal. Env'tl. Prot. Agency, Office of Env'tl. Health Hazard Assessment, *Health Effects of Exposure to Environmental Tobacco Smoke, Final Report ES-5* (1997).

¹¹ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshaag.pdf> (last accessed August 15, 2003).

¹² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_clean.htm (last accessed Apr. 23, 2003).

¹³ Max W, Rice DP, Zhang X, Sung H-Y, Miller L., *The Cost of Smoking in California, 1999*; California Department of Health Services (2002).

WHEREAS, the medical and economic costs to nonsmokers suffering from lung cancer or heart disease caused by secondhand smoke are nearly \$6 billion per year in the United States;¹⁴

WHEREAS, almost 90% of adult smokers started smoking at or before age 18;¹⁵ and

WHEREAS, it is estimated that 13.2% of California high school students smoke¹⁶ and [number / percentage] youth residing in [your region] smoke; and

WHEREAS, with certain exceptions, state law prohibits smoking inside an enclosed place of employment;¹⁷ and

WHEREAS, state law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees;¹⁸ and

WHEREAS, state law prohibits smoking in playgrounds and tot lots and within twenty feet of the main entrances and exits of public buildings while expressly authorizing local communities to enact additional restrictions;¹⁹ 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 tobacco use around non-tobacco users; by protecting children from exposure to smoking and tobacco while they play; by reducing the potential for children to associate smoking and tobacco with a healthy lifestyle; by protecting the public from smoking and tobacco-related litter and pollution; and by affirming and promoting the family atmosphere of the [City's / County's] public places.

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:

¹⁴ American Academy of Actuaries, *Costs Associated with Secondhand Smoke*, October, 2006, available at http://www.actuary.org/pdf/health/smoking_oct06.pdf (last accessed October 11, 2006).

¹⁵ National Household Surveys on Drug Abuse, unpublished data, 1998. See also, U.S. Dep't of Health & Human Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 101 (1994).

¹⁶ Tobacco Control Section, Cal. Dep't of Health Servs., *Youth Smoking* (November 2005), at <http://www.dhs.ca.gov/tobacco/documents/pubs/YouthSmoking.pdf> (last accessed November 7, 2006).

¹⁷ Cal. Lab. Code § 6404.5 (West 2003).

¹⁸ Cal. Educ. Code § 48901(a) (West 2003).

¹⁹ Cal. Health & Safety Code § 104495 (West 2003) and Cal. Gov't Code § 7596 (effective January 1, 2004).

(a) “Business” means any sole proprietorship, partnership, joint venture, corporation, association, or other entity formed for profit-making purposes or that has an Employee, as defined in this section.

(b) “Dining Area” means any area available to or customarily used by the general public, that is designed, established, or regularly used for consuming food or drink.

(c) “Employee” means any person who is employed; retained as an independent contractor by any Employer, as defined in this section; or any person who volunteers his or her services for an Employer, association, nonprofit, or volunteer entity.

(d) “Employer” means any person, partnership, corporation, association, nonprofit or other entity who employs or retains the service of one or more persons, or supervises volunteers.

(e) “Enclosed” means:

(1) any covered or partially covered space having more than 50% of its perimeter area walled in or otherwise closed to the outside such as, for example, a covered porch with more than two walls; or

(2) any space open to the sky (hereinafter “uncovered”) having more than 75% of its perimeter area walled in or otherwise closed to the outside such as, for example, a courtyard;

(3) except that an uncovered space of three thousand (3000) square feet or more is not Enclosed, such as, for example, a field in an open-air arena.

(f) “Multi-Unit Residence” means a building or portion thereof that contains more than one dwelling space consisting of essentially complete independent living facilities for one or more persons, including, for example, permanent provisions for living, sleeping, eating, cooking, and sanitation. [A single-family house shared by roommates is not Multi-Unit Residences for purposes of this section.]

(g) “Multi-Unit Residence Common Area” means any indoor or outdoor common area of a Multi-Unit Residence accessible to and usable by more than one residence, including but not limited to halls, lobbies, laundry rooms, outdoor eating areas, play areas and swimming pools.

(h) “Nonprofit Entity” means any entity that meets the requirements of California Corporations Code section 5003 as well as any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, political, social or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A public agency is not a nonprofit entity within the meaning of this section.

(i) “Place of Employment” means any area under the legal or de facto control of an Employer, Business or Nonprofit Entity that an Employee or the general public may have cause to enter in the normal course of operations, but regardless of the hours of operation, including, for example, indoor and outdoor work areas, construction sites, vehicles used in employment or for business purposes, taxis, employee lounges, conference and banquet rooms, bingo and gaming facilities, long-term health facilities, warehouses, and private residences that are used as child care or health care facilities subject to licensing requirements.

(j) “Playground” means any park or recreational area designed in part to be used by children that has play or sports equipment installed or has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds, or on [City / County] grounds.

(k) “Public Place” means any place, public or private, open to the general public regardless of any fee or age requirement, including, for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

(l) “Reasonable Distance” means a distance that ensures that occupants of an area in which smoking is prohibited are not exposed to secondhand smoke created by smokers outside the area. This distance shall be a minimum of twenty (20) feet.

(m) “Recreational Area” means any area, public or private, open to the public for recreational purposes regardless of any fee requirement, including, for example, parks, gardens, sporting facilities, stadiums, and playgrounds.

(n) “Service Area” means any area designed to be or regularly used by one or more persons to receive or wait to receive a service, enter a public place, or make a transaction whether or not such service includes the exchange of money including, for example, ATMs, bank teller windows, telephones, ticket lines, bus stops, and cab stands.

(o) “Significant Tobacco Retailer” means any tobacco retailer that derives seventy-five percent (75%) or more of gross sales receipts from the sale or exchange of tobacco products and tobacco paraphernalia.

(p) “Smoking” means possessing a lighted pipe, lighted cigar, or lighted cigarette of any kind, or the lighting of a pipe, cigar, or cigarette of any kind, including, but not limited to, tobacco, or any other weed or plant.

(q) “Tobacco Product” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco.

**Sec. [____ (*2)]. PROHIBITION OF SMOKING IN PUBLIC PLACES,
PLACES OF EMPLOYMENT, AND CERTAIN OTHER AREAS**

(a) Enclosed Places. Smoking shall be prohibited in the following Enclosed places within the [City / County of ____] except in places listed in subsection (d) below, and except in such places in which smoking is already prohibited by state or federal law in which case the state or federal law applies:

(1) Public Places;

(2) Places of Employment;

(3) Multi-Unit Residence **INDOOR** Common Areas;

(4) Enclosed areas adjacent to an Enclosed area in which smoking is prohibited by any other [article / section] of this code, state law, or federal law and that have a common or shared air space such as, without limitation, openings, cracks, air ventilation systems, doorways, hallways, and stairways. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space;

(5) Enclosed areas that have a common or shared ventilation, air conditioning or heating system with an Enclosed area in which smoking is prohibited. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space.

(b) Unenclosed Places. Smoking shall be prohibited in the following Unenclosed places within the [City / County of ____] except in such places in which smoking is already prohibited by state or federal law in which case the state or federal law applies:

(1) Places of Employment;

(2) Service Areas;

(3) Public Places including Dining Areas [except Unenclosed areas of a bar that does not serve food. If smoking is permitted in the Unenclosed area of a bar that does not serve food, the entire smoking section must be limited to one clearly designated area prominently marked with signs, and must be located at least five (5) feet from any doorway or opening into an Enclosed area. Smoking in an Unenclosed area of a bar is only permitted provided the smoke does not enter adjacent areas in which smoking is prohibited by any law or by the owner, lessee or licensee of the adjacent property.];

(4) Multi-Unit Residence Common Areas;

- (5) Ticket, boarding, and waiting areas of transit depots; and
- (6) The sites of public events including, for example, Solano Stroll, sports events, entertainment, speaking performances, ceremonies, pageants, and fairs.
- (7) Bicycle trails, Pedestrian trails and other public trails
- (8) Parks
- (9) Beaches
- (10) Solano Avenue from the Berkeley border to San Pablo Avenue
- (11) San Pablo Avenue
- (12) The block where Albany HS is located and in “similar locations
 - a. Portland/Key Route to Portland/Carmel to Carmel/Thousands Oaks to Key Route/Thousand Oaks
 - b. Additionally, all tobacco use would be banned. In other words no use of spitting/chewing tobacco
- (13) Outdoor areas of shopping malls
- (14) Parking lots
- (15) Children’s playground equipment

(c) No person shall dispose of Smoking waste within the boundaries of an area in which smoking is prohibited, including inside the perimeter of any Reasonable Distance required by this [article / chapter].

[(d) Unless otherwise prohibited by law, smoking is permitted in the following Enclosed places:

(1) Significant tobacco retailers, if at all times minors are prohibited from entering the store;

(2) By performers during theatrical productions, if smoking is an integral part of the story in the theatrical production and so noticed in the program.

;

(3) Private residential units, except those used as a child care or health care facility subject to licensing requirements; and

(4) Up to [twenty-five percent (25%)] of hotel and motel guest rooms, if the hotel or motel permanently designates particular guest rooms as nonsmoking rooms such that [seventy-five (75%)] or more of its guest rooms are nonsmoking and ashtrays and matches are permanently removed from such nonsmoking rooms. Permanent “no smoking” signage shall be posted in nonsmoking rooms.]

Sec. [____ (*3)]. REASONABLE SMOKING DISTANCE REQUIRED—20 FEET

(a) Smoking in Unenclosed areas shall be prohibited within a Reasonable Distance from any entrance, opening, crack, or vent into an Enclosed area in which smoking is prohibited, except while actively passing on the way to another destination and so long as smoke does not enter any Enclosed area in which smoking is prohibited.

(b) Smoking in Unenclosed areas shall be prohibited within a Reasonable Distance from any Unenclosed area in which smoking is prohibited under Section [____ (*2)] of this [article / chapter] except while actively passing on the way to another destination.

Sec. [____ (*4)]. DUTY OF PERSON, EMPLOYER, BUSINESS, OR NONPROFIT ENTITY

(a) No person, Employer, Business, or Nonprofit Entity shall knowingly permit the Smoking of Tobacco Products in an area which is under the legal or de facto control of the person, Employer, Business, or Nonprofit Entity and in which smoking is prohibited by law and the person, Employer, Business or Nonprofit Entity is not otherwise compelled to act under state or federal law.

(b) No person, Employer, Business, or Nonprofit Entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area which is under the legal or de facto control of the person, Employer, Business, or Nonprofit Entity and in which smoking is prohibited, including, without limitation, inside the perimeter of any Reasonable Distance required by this [article / chapter].

(c) Notwithstanding any other provision of this [article / chapter], any owner, landlord, Employer, Business, Nonprofit Entity, or other person who controls any property, establishment, or Place of Employment regulated by this chapter may declare any part of such area in which smoking would otherwise be permitted to be a nonsmoking area.

(d) “No Smoking” or “Smoke Free” signs, with letters of no less than one inch in height or the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in every Enclosed and Unenclosed place in which Smoking is prohibited by this chapter, by the person, Employer, Business, or Nonprofit Entity that has legal or de facto control of such place. [At least one sign with the [City / County] phone number where complaints

can be directed must be conspicuously posted in every place in which smoking is prohibited.] For purposes of this chapter, the City Manager or designee shall be responsible for the posting of signs in regulated facilities owned or leased in part by the [City/ County]. Notwithstanding this provision, the presence or absence of signs shall not be a defense to the violation of any other provision of this [article / chapter].

Sec. [____ (*5)]. PENALTIES AND ENFORCEMENT.

(a) Violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors.

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

(c) Any person who Smokes in an area where Smoking is prohibited is guilty of trespass and, if the area is accessible by the public or any Employee during the normal course of operations, such Smoking constitutes a public nuisance.

(d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance shall also constitute a violation.

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

(f) Enforcement of this chapter shall be the responsibility of [____]. Any peace officer or code enforcement official also may enforce this chapter.

Sec. [____ (*6)]. PRIVATE ENFORCEMENT.

(a) Any person acting for the interests of itself, its members, or the general public (hereinafter “the Private Enforcer”) may bring a civil action to enforce this chapter. Upon proof of a violation, a court shall award the following:

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$[250] for each violation of this chapter (hereinafter “Statutory Damages”). Unless otherwise specified in this chapter, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this chapter, no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this chapter if a previous claim brought on behalf of the general public for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Private Enforcer was a party to that adjudication.

(2) Restitution of the gains obtained in violation of this chapter.

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

(b) The Private Enforcer may also bring a civil action to enforce this 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.

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

(d) Nothing in this chapter shall prohibit the Private Enforcer from bringing a civil action in small claims court to enforce this chapter, so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of small claims court as set forth in California Code of Civil Procedure section 116.220.

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SECTION III. SEVERABILITY. 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 is declared invalid or unenforceable.

Additional Provision

Throwing cigarette butts on the ground is littering.

Smokefree Housing Provision (from Oakland plus my additions)

D. Disclosure of smoking policy in new and existing Multi-housing

a. All landlords in Multi-housing complexes are required to disclose to prospective tenants whether smoking is permitted in the unit to be rented and, which units are designated smoking units and the smoking policy for the complex. This information shall be in the rental agreement if there is one.

b. Within three months of receiving a questionnaire from the city administrator or his/her designee, the landlord must fill out the questionnaire provided by the city administrator relating to smoking policy. This information will be posted on the city's web site.

1. In part a or b If a landlord specifies a unit or a facility as nonsmoking, then the landlord cannot change his/her mind and make it smoking allowed.
2. If the facility is sold, the new owner cannot make the units smoking allowed.
3. Individual would have a private right to action
4. If a landlord converts a unit to nonsmoking, then the first tenant to get the unit post conversion must be notified in writing of the change
5. There is some sort of ordinance violation if the landlord violates this section and there is also a private right to action.

b. All sellers of condominium units are required to disclose in writing to prospective buyers respectively whether smoking is permitted in the unit and the smoking policy for the complex.