

Ordinance #08-03

AN ORDINANCE OF THE ALBANY CITY COUNCIL PROHIBITING SMOKING IN OR AROUND WORKPLACES, RECREATIONAL AREAS, AND OTHER PLACES AND AMENDING THE ALBANY MUNICIPAL CODE

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; and

WHEREAS, more than 438,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death; 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; 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; 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; and

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; 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; 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, including 3,000 deaths from lung cancer; 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; 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, exacerbates childhood asthma, and increases the risk of acute chronic middle ear infection in children; 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; and

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;

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

WHEREAS, it is estimated that 13.2% of California high school students smoke; and

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

WHEREAS, state law prohibits smoking within twenty-five feet of 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; and

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

- in 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarette butts; and
- children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging; and

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

- it is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year; and
- cigarette butts are often cast onto sidewalk and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean; and
- cigarette butts, made of plastic cellulose acetate, take approximately 15 years to decompose; and

NOW, THEREFORE, THE ALBANY CITY COUNCIL HEREBY ORDAINS AS FOLLOWS:

Section 1

Sections 17-1.0 through 17-1.15 are hereby deleted in their entirety and new Sections 17-1.0, et seq. are enacted to read as follows:

Section 2

17-1.0 TITLE

Chapter 17-1.0 shall be known as Smoking Pollution Control.

17-1.1 Findings and Purpose

The City Council of the city finds that:

- a. Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution; and
- b. Reliable studies have shown that breathing secondhand smoke is a significant health hazard for certain population groups, including elderly people, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease; and
- c. Health hazards induced by breathing secondhand smoke include lung cancer, respiratory infection, decreased exercise tolerance, decreased respiratory function, bronchoconstriction, and bronchospasm; and

d. Nonsmokers who suffer allergies, respiratory diseases and other ill effects of breathing secondhand smoke may experience a loss of job productivity or may be forced to take periodic sick leave because of such adverse reactions; and

e. Numerous studies have shown that a majority of both nonsmokers and smokers desire to have restrictions on smoking in public places and places of employment; and

f. Smoking is a documented cause of fires, and cigarette and cigar burns and ash stains on merchandise and fixtures cause economic losses to businesses; and

g. Accordingly, the City Council finds and declares that the purposes of this chapter are (1) to protect the public health and welfare by prohibiting smoking in public places, places of employment, and specifically designated public play areas where small children are at risk of choking on or ingesting cigarette butts and other toxic tobacco liter, and (2) to guarantee the right of nonsmokers to breathe smoke-free air, and to recognize that the need to breathe smoke-free air shall have priority over the desire to smoke.

17-1.2 DEFINITIONS.

For the purposes of this section the following definitions shall govern unless the context clearly requires otherwise:

a. “Bar” means any area utilized primarily for the sale of alcoholic beverages for consumption by patrons on the premises and in which the serving of food is merely incidental to the sale and consumption of alcoholic beverages and in which persons younger than twenty-one (21) years of age are at all times excluded. Although a restaurant may contain a bar, the term “Bar” shall not include a restaurant Dining Area.

b. “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.

c. “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.

d. “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.

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

f. “Enclosed” means:

1. any covered or partially covered space having walls, privacy fences, tents, windbreaks, or other structures or fixtures causing it to be closed to the outside that are five (5) feet or taller surrounding more than 50% of its perimeter area 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.

g. “Multi-Unit Residence” means a premises that contains two (2) or more Units. A single-family house shared by roommates is not a Multi-Unit Residence for purposes of this section.

h. “Multi-Unit Residence Common Area” means any indoor or outdoor common area of a Multi-Unit Residence accessible to and usable by residents of different Units, including but not limited to halls and paths, lobbies, laundry rooms, common cooking areas, outdoor eating areas, play areas, swimming pools, and parking areas.

i. “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.

j. “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, buses, employee lounges, conference and banquet rooms, Bars, restaurants, bingo and gaming facilities, long-term health facilities, warehouses, and private residences that are used as childcare or healthcare facilities subject to licensing requirements.

k. “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 grounds.

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-five (25) feet.

m. “Recreational Area” means any area, public or private, open to the general public for recreational purposes regardless of any fee or age requirement, including, for example, parks, picnic areas, gardens, walking paths, bike paths, hiking trails, sporting facilities and sports fields, 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 Tobacco Product, lighted pipe, lighted cigar, or lighted cigarette of any kind, or the lighting of a Tobacco Product, 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.

r. “Unit” means: (1) a dwelling space consisting of essentially complete independent living facilities for one or more persons, including, for example, permanent provisions for living and sleeping, and any private outdoor spaces like balconies and patios; and (2) senior citizen housing and single room occupancy hotels, as defined in California Health and Safety Code section 50519(b)(1), even where lacking private cooking facilities or private plumbing facilities. “Unit” does not include lodging in a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2).

17-1.3 PROHIBITION OF SMOKING IN PLACES OF EMPLOYMENT AND CERTAIN OTHER AREAS

a. Enclosed Places. Smoking shall be prohibited in the following Enclosed places within the City 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. Places of Employment;
2. Multi-Unit Residence Common Areas;
3. Enclosed areas adjacent to an Enclosed area in which Smoking is prohibited by any other 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 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. Recreational Areas and Playgrounds;
4. Dining Areas, except unenclosed areas of a Bar that does not serve food,

with the exception of the unenclosed areas of any Bars where food has been served for at least 90 days prior to the passage of this ordinance. If Smoking is permitted in such an unenclosed area, 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 Enclosed or unenclosed areas, excluding public sidewalks, in which Smoking is prohibited by any law or by the owner, lessee or licensee of the adjacent property;

5. Multi-Unit Residence Common Areas;

(a) Smoking is prohibited in all Multi-Unit Residence Common Areas except that a landlord may designate a portion of the outdoor area of premises as a Smoking area as provided in paragraph (b) below.

(b) A designated Smoking area:

(1) must be located a Reasonable Distance from any indoor area where Smoking is prohibited;

(2) must not include, and must be a Reasonable Distance from, outdoor areas primarily used by children including, but not limited to, areas improved or designated for play or swimming;

(3) must constitute no more than twenty-five percent (25%) of the total outdoor area of the premises for which it is designated;

(4) must have a clearly marked perimeter;

(5) must be identified by conspicuous signs; and

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

6. Sidewalks adjacent to any public or private school property;
7. The sites of public events during the events including, for example, sports events, theatrical performances, speeches, ceremonies, pageants, farmers' markets, parades, and fairs; and
8. Sidewalks on Solano Avenue, between San Pablo Avenue and the City of Berkeley jurisdictional border.

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 section.

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;
3. Private residential units, except those used as a child care or health care facility subject to licensing requirements; and
4. Up to twenty percent (20%) of hotel and motel guest rooms, if the hotel or motel permanently designates particular guest rooms as nonsmoking rooms such that eighty (80%) 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.
5. In a unit of a Multi-Unit Residential Building, if the unit is occupied by a person who has an ownership interest in the property.

17-1.4 REASONABLE SMOKING DISTANCE REQUIRED—25 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 by any law or by the owner, lessee or licensee of the adjacent property.

b. Smoking in unenclosed areas shall be prohibited within a Reasonable Distance from any unenclosed area in which Smoking is prohibited under Section 17-1.3(b)(1-8) of this section except while actively passing on the way to another destination.

17-1.5 DUTY OF PERSON, EMPLOYER, BUSINESS, LANDLORD, OR NONPROFIT ENTITY

a. No Person, Employer, Business, landlord, 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, landlord, or Nonprofit Entity and in which Smoking is prohibited by this section, this Code, or any other state or federal law provided, however, that this prohibition does not apply to a Person, Employer, Business, landlord, or Nonprofit Entity already compelled to act under state or federal law.

b. No Person, Employer, Business, landlord, 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, landlord, or Nonprofit Entity and in which Smoking is prohibited, including, without limitation, inside the perimeter of any Reasonable Distance required by this section.

c. Notwithstanding any other provision of this section, 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, landlord, or Nonprofit Entity that has legal or de facto control of such place. At least one sign with the City 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 Administrator or designee shall be responsible for the posting of signs in regulated facilities owned or leased in part by the City. Notwithstanding this provision, the presence or absence of signs shall not be a defense to the violation of any other provision of this section.

e. Disclosure of Smoking Policy in New and Existing Multi-unit Housing

1. Every landlord of a Multi-Unit Residence shall maintain a list of designated nonsmoking Units, a list of designated smoking units, and a floor plan identifying the relative position of Smoking and nonsmoking Units. The floor plan also shall identify the location of any designated Smoking areas. At the time the lease is signed, the tenant shall also initial or sign that they received these documents. The list and plan shall be incorporated as exhibits into the lease signed by the Tenant and Landlord.

2. All sellers of condominium units are required to disclose to prospective buyers in writing whether Smoking has been permitted in the Unit and the Smoking policies for the complex.

17-1.6 PENALTIES AND ENFORCEMENT.

a. Any person who violates any provisions of this section shall be guilty of any infraction, punishable by:

1. A fine, not less than fifty (\$50.00) dollars or more than one hundred (\$100.00) dollars for the first violation.

2. A fine, not less than one hundred (\$100.00) dollars nor more than two-hundred fifty (\$250.00) dollars for the second violation within a year.

3. A fine, not less than two-hundred fifty (\$250.00) dollars nor more than five hundred (\$500.00) dollars for each additional violation of this section within a year.

b. Notwithstanding any other penalty provision in this section, on the proper application, a court is hereby authorized to issue an injunction to prohibit any continued violations or nuisances that fall within the acts prohibited under this section.

c. Upon a proper showing and hearing before the City Council that determines that a Business establishment has violated the prohibitions contained in this section more than three (3) times in any calendar year, the City Council has the discretion to revoke the business license of the establishment.

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 section 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 the police department. Any peace officer or code enforcement official also may enforce this chapter.

17-1.7 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.

Section 3: Publication

This ordinance shall be published in a newspaper of general circulation in the City of Albany, which said newspaper is designated for that purpose, or it shall be posted in three locations.

Section 4: Severability

If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of the

ordinance, and each section, subsection, sentence, clause, or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clause or phrases be declared invalid.

Section 5: Effective Date

This ordinance shall become effective 30 days on or after its final passage and adoption.