

ORDINANCE NO. 17-

An Ordinance Of The City Council Of The City Of Emeryville Repealing And Replacing Chapter 29 Of Title 5 Of The Emeryville Municipal Code, “Smoking Pollution Control” CEQA Determination: Exempt Pursuant To Section 15061(B)(3) Of The California CEQA Guidelines

WHEREAS, the State of California finds that smoking in the workplace is matter of statewide concern and interest and has codified Labor Code section 6404.5 to create a uniform statewide standard to restrict and prohibit smoking of tobacco products in enclosed places of employment; and

WHEREAS, Business and Professions Code section 22950.5 defines smoking broadly to include the smoking of any heated tobacco or plant product and to include the use of an electronic smoking device; and

WHEREAS, *City of San Jose v. Department of Health Services* (1998) 66 Cal.App.35, 44 held that local governments may adopt and enforce local smoking restrictions if they do not apply to areas not covered by state law;

WHEREAS, the dangers of secondhand tobacco smoke to human health, which can lead to diseases such as heart disease and lung cancer, and premature death, is well-documented; and

WHEREAS, the secondhand smoke from the use of electronic smoking devices also poses a danger to human health by emitting the same dangerous toxins such as heavy metals and carcinogens as tobacco smoke from cigarettes; and

WHEREAS, the secondhand smoke from cannabis poses some of the same threats to human health as the secondhand smoke from tobacco and electronic smoking devices; and

WHEREAS, the City Council of the City of Emeryville adopted Ordinance No. 80-07, restricting smoking in certain enclosed places, such as hotel lobbies, retail stores, pharmacies, banks and other offices, waiting rooms, health facilities, schools and enclosed theatres; and

WHEREAS, in light of recent state law changes with the enactments of AB 13, AB 846 and AB 2067, in 2006 the City Council adopted Ordinance No. 06-021, which was codified as Chapter 29 of Title 5 of the Emeryville Municipal Code; and

WHEREAS, in 2010, the City Council amended section 5-29.03 of the Emeryville Municipal Code to clarify that the chapter did not apply to open air barbeques; and

WHEREAS, on September 20, 2016, the City Council held a study session to consider modifying Chapter 29, of Title 5 of the Emeryville Municipal Code, “Smoking Pollution Control Ordinance”, and directed staff to work with the Housing Committee to conduct surveys and outreach within the community to determine community preferences; and

WHEREAS, City staff partnered with the Alameda County Public Health Department Tobacco Control Program (ACPHD-TCP) to obtain assistance with the community survey and outreach, and with input from cities across Alameda County (including Emeryville), the ACPHD-TCP is conducting an online survey for all cities in Alameda to obtain community input on issues related to smoking; and

WHEREAS, the community survey indicates that community members prefer to live in housing that is free from all smoke, regardless of the type of smoke; and

WHEREAS, the Housing Committee believes that the data collected indicates a community preference to have housing that is free of all smoke regardless of type, and regardless of the type of housing (rental vs condo); and therefore, the Committee recommended that the City's ordinance reflect those preferences; provided, however, the Committee requested that for multi-unit residences, staff look into creating space where smoking could occur, yet not impact residents; now, therefore

THE CITY COUNCIL OF THE CITY OF EMERYVILLE DOES HEREBY ORDAIN AS FOLLOWS:

SECTION ONE. REPEALING AND REPLACING CHAPTER 29 OF TITLE 5 TO THE EMERYVILLE MUNICIPAL CODE IN ITS ENTIRETY

Chapter 29 of Title 5 of the Emeryville Municipal Code, entitled “Smoking Pollution Control”, is hereby repealed in its entirety, and replaced with the following:

CHAPTER 29.

SMOKING POLLUTION CONTROL

Sections:

5-29.01 Title

5-29.02 Definitions

5-29.03	Application to City Facilities, Areas and Vehicles
5-29.04	Prohibition of Smoking in Public Places
5-29.05	Prohibition of Smoking in Places of Employment
5-29.06	Duty of Employer, Business, or Nonprofit Entity
5-29.07	Areas Not Subject to Smoking Regulations
5-29.08	Tobacco Vending Machines Prohibited
5-29.09	Smoking Lounges, including Hookah and Cigar Bars Prohibited
5-29.10	Restriction on Proximity of Tobacco Shops
5-29.11	Reasonable Smoking Distance Required – 25 feet
5-29.12	Posting of Signs
5-29.13	Interpretation
5-29.14	Secondhand Smoke – Declaration of Nuisance
5-29.15	Enforcement – Administrative Officer Designated
5-29.16	Violation – Penalty
5-29.17	Appeal Process

5-29.01 Title.

This chapter shall be known as the “Smoking Pollution Control Ordinance.”

5-29.02 Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

(a) “Cannabis” includes marijuana and means any or all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not, the seeds thereof, the resin or separated resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin.

(b) “Common Area,” means every Enclosed Area and every Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit are entitled to enter or use, including without limitation, halls, pathways, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, grassy or landscaped areas, restrooms, laundry rooms, cooking areas, and eating areas.

(c) “Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, Cannabis or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

(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 walls or other physical boundaries of any height, whether or not those boundaries include vents or

other openings; or 2) four walls or other vertical boundaries that exceed six feet in height, whether or not those boundaries include vents or other openings.

(e) “Multi-Unit Residence” means residential property containing two or more units, with one or more shared wall, floor, ceiling or ventilation system, including apartments, condominiums, duplexes or townhomes and their patios and balconies. A Multi-Unit Residence does not include: a hotel or motel; a residential care facility or assisted living facility governed by federal or state community care licensing regulations; and a single-family residence, including one which has a detached permitted secondary unit on the same lot, unless the single-family residence is used as a day care center.

(f) “Public Place” means any place, public or private, open to the general public regardless of any fee or age requirement, including for example, businesses, bars, restaurants, clubs, dining areas, outdoor recreational facilities, sports arena, stores, stadiums, parks, greenways, playgrounds (including tot lots), retail stores, theaters and waiting rooms. Excludes a place that has a Cannabis Sales conditional use permit pursuant to Title 9 of the Emeryville Municipal Code and Dispensary/Retailer Operator’s permit pursuant to Chapter 28 of Title 5 of the Emeryville Municipal Code.

(g) “Reasonable Distance” means a distance of twenty-five feet (25') that ensures that occupants of an area in which Smoking is prohibited are not exposed to Secondhand Smoke created by smokers outside the area.

(h) “Retail or wholesale tobacco shop” means any business establishment that derives fifty percent (50%) or more of gross receipts from the sale or exchange of Tobacco Products or any other weed, plant or combustible substance, including Smoking paraphernalia.

(i) “Secondhand Smoke” means the Smoke created by burning or carrying any lighted pipe, cigar, hookah, narghile, sheesha, cigarette, or Tobacco Product of any kind, or any other weed, plant or combustible substance, including Cannabis, and the Smoke exhaled by an individual who engages in Smoking as defined in this section.

(j) “Service lines” means any place where people are using or waiting for a service, entry, or a transaction whether or not such service includes the exchange of money including, but not limited to, ATMs, bank teller windows, telephones, ticket lines, and waiting areas of public transit or cab depots.

(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, nicotine or Cannabis, and the purpose of inhalation is solely olfactory, such as for example, Smoke from incense. The term “Smoke” includes, but is not limited to, tobacco Smoke, Electronic Smoking Device vapors, Cannabis Smoke, and crack cocaine Smoke.

(l) “Smoking” means inhaling, exhaling, burning or carrying any lighted, heated, or ignited pipe, cigar, hookah, narghile, sheesha, cigarette, cigarillo, Electronic Smoking

Device or any plant product, including tobacco or Cannabis intended for human inhalation

(m) “Smoking Lounges” means a business establishment that is dedicated, in whole or part, to the Smoking of Tobacco Products of any kind, or any other weed, plant or combustible substance, including Cannabis, including but not limited to establishments known variously as cigar, hookah, narghile, sheesha or tobacco lounges, clubs, bars or cafes, whether private or public. For purposes of this chapter “Smoking lounges” include such establishments where the sale of beverages or food for consumption occurs on such premises, even where incidental to stated purpose. Excludes a place that has a Cannabis Sales conditional use permit pursuant to Title 9 of the Emeryville Municipal Code that allows for Smoking.

(n) “Smoking paraphernalia” means cigarette papers or wrappers, pipes, holders of Smoking materials of all types, hookahs, cigarette rolling machines, electronic cigarettes and any other item designed for the Smoking or ingestion of Tobacco Products or any other weed, plant or combustible substance, including Cannabis.

(o) “Tobacco Product” means any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether Smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, and snuff. Also includes any component, part, or accessory of a Tobacco Product, whether or not sold separately. Excludes any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

(p) “Unenclosed area” means any area that is not an Enclosed Area.

(q) “Vending machine” means any electronic or mechanical device or appliance, the operation of which depends upon insertion of money, whether in coin or in paper bill, or other thing representative of value, which dispenses or releases Tobacco Products, Cannabis and/or Smoking paraphernalia.

5-29.03 Application to City Facilities, Areas and Vehicles.

Except for the public right of way, Smoking shall be prohibited in all facilities, areas, and vehicles owned, leased, operated or controlled by the City of Emeryville, and all such areas shall be subject to the provisions of this chapter.

5-29.04 Prohibition of Smoking in Public Places.

(a) Smoking shall be prohibited in any and all Public Places within the City of Emeryville whether enclosed or unenclosed, including the enclosed places identified in California Labor Code Section 6404.5(e), or its successor, unless an exception exists elsewhere in either State law or this chapter.

(b) To the extent not prohibited by subsection (a) of this section, Smoking shall be prohibited in the following places:

- (1) In all units of a Multi-Unit Residence, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio.
 - (2) Areas of the lobby in a hotel, motel, or other similar transient lodging establishment. For purposes of this paragraph, "lobby" means the common public area of an establishment in which registration and other similar or related transactions, or both, are conducted and in which the establishment's guests and members of the public typically congregate.
 - (3) Hotel and motel rooms rented to guests designated as non-Smoking rooms. Hotels and motels must designate not less than eighty percent (80%) of their guest rooms as non-Smoking rooms and remove ashtrays from these rooms.
 - (4) Meeting and banquet rooms in a hotel, motel, other transient lodging establishment similar to a hotel or motel, restaurant, or public convention center, including while food or beverage functions are taking place, setup, service, and cleanup activities, or when the room is being used for exhibit purposes.
 - (5) Retail, or wholesale tobacco shops and Smoking Lounges as defined herein and by California Labor Code § 6404.5(e)(2).
 - (6) Buses, taxicabs and other means of public transit offered within the City, and Service Lines.
 - (7) Retail stores.
 - (8) All Enclosed Areas available to and customarily used by the general public in all businesses and nonprofit entities patronized by the public, including, but not limited to, business offices and banks.
 - (9) Restaurants, dining areas and bars whether enclosed or unenclosed.
 - (10) Sports arenas and convention halls, except in designated Smoking areas approved by the City and which protect non-smokers from Secondhand Smoke.
 - (11) Every room, chamber, and place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, or agencies of the City or any political subdivision of the State during such time as a public meeting is in progress, to the extent such place is subject to the jurisdiction of the City.
 - (12) Parks, playgrounds, and greenways.
 - (13) Family care, childcare, and health care facilities and single family residences used as a family care, childcare or health care facility.
- (c) Notwithstanding any other provision of this section, any person, business, nonprofit entity, owner, operator, manager or employer who controls any premises

described in this section may declare that entire establishment as a non-Smoking establishment.

(d) No person, business, nonprofit entity, owner, operator, manager or employer who controls any premises described in this section shall provide or place ash receptacles such as, without limitation, ashtrays or ash cans, within an area in which Smoking is prohibited, including, without limitation, inside the perimeter of any Reasonable Distance required by this chapter.

5-29.05 Prohibition of Smoking in Places of Employment.

Except as provided for in Section 5-29.07, Smoking shall be prohibited in all places of employment.

5-29.06 Duty of Owner, Employer, Business, or Nonprofit Entity.

(a) No person, business, nonprofit entity, owner, manager, operator or employer shall knowingly or intentionally permit Smoking in an area which is under their control and in which Smoking is prohibited pursuant to this chapter.

(b) No person, business, nonprofit entity, owner, manager, operator or employer shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, without limitation, ash trays or ash cans, within an area which is under their control and in which Smoking is prohibited, including, without limitation, inside the perimeter of any Reasonable Distance required by this chapter.

(c) It shall be the responsibility of employers to provide Smoke-free working areas for all employees, but employers are not required to incur any expense to make structural or other physical modifications. Employers shall post "No Smoking" or "Smoke Free" signs in accordance with Section 5-29.12. Smoking outside of the work building shall occur only at the Reasonable Distance from the building to minimize any Smoke entering the building from operable doors, windows, or vents.

(d) For purposes of this section, a person, business, nonprofit entity, owner, manager, operator or employer who permits any person access to an area under their control has not acted "knowingly" or "intentionally" if the following reasonable steps have been taken to prevent Smoking:

- (1) "Smoking" or "No Smoking" signs, whichever are appropriate, have been posted in accordance with Section 5-29.12; and
- (2) Has requested, when appropriate, that a person who is Smoking in violation of this chapter to refrain from Smoking; and
- (3) Has registered a complaint, when appropriate, to initiate enforcement with the City when the person who is Smoking in violation of this chapter refuses to refrain from Smoking.

For purposes of this subsection, "reasonable steps" does not include any obligation on the part of the person, business, nonprofit entity, owner, manager, operator or employer who is in control of an area in which Smoking is prohibited to (A) effect the physical

ejection of the person who is Smoking from the area or (B) make a request of a person to refrain from Smoking under circumstances involving a risk of physical harm to any person.

5-29.07 Areas Not Subject to Smoking Regulations.

Notwithstanding any other provisions of this Chapter to the contrary, the following areas shall not be subject to the restrictions of this Chapter:

- (a) Unenclosed Areas outside of the Reasonable Distance, as defined in this chapter, from any operable entry way, window, or vent into any area in which Smoking is prohibited by this chapter.
- (b) Hotel and motel rooms rented to guests, provided however, that each hotel and motel designates not more than eighty percent (80%) of their guest rooms as Smoking rooms and removes ashtrays from all other rooms designated as non-Smoking rooms.
- (c) Single family residences, except where used as a family care, childcare or health care facility.
- (d) Medical research or treatment sites if Smoking is integral to the research and treatment being conducted.
- (e) A designated Smoking area in a Common Area that meets all of the following requirements: (1) Unenclosed Area, (2) at least a Reasonable Distance from Unenclosed Areas primarily used by children, and Unenclosed Areas with improvements that facilitate physical activity, such as playgrounds, tennis courts, and swimming pools, and (3) located so that Smoke does not drift into an Enclosed Area where Smoking is prohibited.
- (f) A Cannabis sales use if site has obtained a conditional use permit pursuant to Title 9 of the Emeryville Municipal Code, and the conditional use permit allows for Smoking of Cannabis.

5-29.08 Tobacco Vending Machines Prohibited.

No cigarette or other Tobacco Product may be sold, offered for sale, or distributed by or from a Vending Machine or other appliance, or any other device designed or used for vending purposes, except from Vending Machines located on premises which have either a type 61, type 42 or type 48 license or their equivalent from the Department of Alcoholic Beverage Control or other premises which persons younger than twenty-one (21) years of age are at all times excluded, including card rooms which are licensed to operate within the City of Emeryville in accordance with Chapter 5 of Title 5 of the Emeryville Municipal Code.

5-29.09 Smoking Lounges Prohibited.

Smoking shall be prohibited in any Smoking Lounge within the City of Emeryville including such lounges that are owner-operated and would fall under either the Retail Tobacco Shop Exemption of California Labor Code Section 6404.5(d)(4)(b) or Small Business Exemption Section 6404.5 and such successors as may follow.

5-29.10 Restriction on Proximity of Tobacco Shops.

Retail or wholesale tobacco shops are prohibited from being located within one thousand feet (1,000') of public or private schools and parks, greenways and playgrounds.

5-29.11 Reasonable Smoking Distance Required – 25 feet.

(a) Smoking shall be prohibited within a Reasonable Distance, as defined in this chapter, from any operable entry way, window, or vent into an Enclosed Area of any area in which Smoking is prohibited by this chapter, except while actively passing on the way to another destination and without entering or crossing any area in which Smoking is prohibited.

(b) Smoking shall be prohibited within a Reasonable Distance, as defined in this chapter, from any area in which Smoking is prohibited by this chapter, except while actively passing on the way to another destination and without entering or crossing any area in which Smoking is prohibited.

5-29.12 Posting of Signs.

(a) "Smoking" or "No Smoking" signs, whichever are appropriate, with letters of not less than one inch (1") 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 inside and outside of buildings and other general areas where Smoking is controlled by this chapter, by the owner, operator, manager or other person having control of such buildings or areas. When a sign is posted on the exterior of a building to indicate no Smoking, it shall include the Reasonable Distance limitations contained in this chapter.

(b) Every theater and hotel or motel owner, manager, or operator shall conspicuously post signs in the lobby, meeting and banquet rooms and other general areas stating that Smoking is prohibited within the hotel, motel, theater or auditorium.

5-29.13 Interpretation.

This chapter shall not be interpreted or construed to permit Smoking where it is otherwise restricted by other applicable laws. Further, to the extent Smoking is already prohibited by provisions of State or Federal law, then such State or Federal laws shall apply.

5-29.14 Secondhand Smoke – Declaration of Nuisance.

Secondhand Smoke in violation of this Chapter constitutes a nuisance.

5-29.15 Enforcement – Administrative Officer Designated.

(a) Enforcement shall be implemented by the City Manager, or his or her designee.

(b) Any citizen who desires to register a complaint hereunder may initiate enforcement with the City Manager, or his or her designee.

(c) Any person, business, nonprofit entity, owner, manager, operator or employer who owns, manages, operates or otherwise controls the use of any premises controlled by this chapter shall have the right to inform persons violating this chapter of the appropriate provisions thereof.

(d) Notwithstanding any other provisions of this chapter, a private citizen may bring legal action to enforce this chapter or to abate Secondhand Smoke as a nuisance. However, the City is not a proper party nor shall a private citizen or any party otherwise bring legal action against the City for nonenforcement of the Smoking Pollution Control Ordinance.

(e) Notwithstanding any other provision of this chapter, no person, business, nonprofit entity, owner, manager, operator or employer who owns, manages, operates or otherwise controls the use of any premises controlled by this chapter shall be cited, fined, subject to an enforcement action brought either by the City or private citizen, or be held guilty or liable for a violation of this chapter, specifically including maintaining a nuisance, as a result of Smoking or permitting Smoking within an area set forth in and in accordance with the requirements of Section 5-29.07.

5-29.16 Violation – Penalty.

(a) It is unlawful for any person, business, nonprofit entity, owner, manager, operator or employer who owns, manages, operates or otherwise controls the use of any premises subject to the regulation under this chapter to fail to comply with its provisions.

(b) It is unlawful for any person to Smoke in any area restricted by the provisions of this chapter.

(c) Any person, business, nonprofit entity, owner, manager, operator or employer who violates any provision of this chapter shall be guilty of an infraction, punishable in accordance with Section 1-2.01.

5-29.17 Appeal Process.

Any enforcement action taken by the City Manager relating to this chapter may be appealed to a hearing officer in accordance with Chapter 7 of Title 1.

SECTION TWO. CEQA DETERMINATION

The City Council finds that adoption of this Ordinance is exempt from the California Environmental Quality Act (“CEQA”) pursuant to section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that the adoption of this Ordinance may have a significant effect on the environment.

SECTION THREE. SEVERABILITY

Every section, paragraph, clause, and phrase of this Ordinance is hereby declared to be severable. If for any reason, any section, paragraph, clause, or phrase is held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining section, paragraphs, clauses or phrases.

SECTION FOUR. EFFECTIVE DATE

This Ordinance shall take effect on _____, 2018. The City Clerk is directed to cause copies of this Ordinance to be posted or published as required by Government Code section 33693.

SECTION FIVE. CODIFICATION

Section One of this Ordinance shall be codified in the Emeryville Municipal Code. Sections Two, Three, Four, and Five shall NOT be so codified.

This Ordinance was introduced and first read by the City Council of the City of Emeryville at a regular meeting on Tuesday, _____ 2017, and **PASSED AND ADOPTED** by the City Council at a regular meeting on Tuesday, _____, 2017 by the following vote:

AYES: _____
 NOES: _____
 ABSTAIN: _____
 ABSENT: _____

ATTEST: _____ MAYOR
 APPROVED AS TO FORM:

 CITY CLERK CITY ATTORNEY