

ORDINANCE NO. 2014-05

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EL CERRITO TO  
REGULATE SMOKING WITHIN THE CITY OF EL CERRITO

SECTION 1. Findings.

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health challenge, 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 and separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to secondhand smoke; 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; and
- 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; and

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

- Secondhand smoke is responsible for an estimated 50,000 deaths among nonsmokers each year in the United States; and
- Exposure to secondhand smoke increases the risk of coronary heart disease and stroke by about 20% to 30%, 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, and exacerbates childhood asthma; and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs, including increased healthcare expenditures, medical costs, and lost productivity; and

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WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, increases air pollution levels, and does occur at significant levels outdoors, and

WHEREAS, cigarette butts are a major and persistent source of litter, pose a health threat to young children, frequently end up in storm drains that flow into streams, rivers, creeks, San Francisco Bay, and ultimately the ocean; adversely impacts the health of both pets and wildlife, and can take up to several years to degrade; and

WHEREAS, cigarettes present a dangerous fire hazard in that every year, men, women and children are killed in home fires caused by cigarettes and other smoking materials; and improperly disposed of cigarettes can easily start fires in outdoor open spaces where there is a risk of wildfire; and

WHEREAS, electronic smoking devices often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

WHEREAS, existing studies on electronic smoking devices' vapor emissions and cartridge contents have found a number of dangerous substances, and conclude that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping; and

WHEREAS, society is becoming less tolerant and less accepting of smoking, particularly in El Cerrito, where a majority of participants in surveys and community meetings indicated a need to regulate smoking within the City limits; and

WHEREAS, though widely perceived as a comprehensive smoke-free air law, the state smoke-free workplace law (California Labor Code section 6404.5) still has several exemptions and loopholes that permit smoking in a wide variety of workplaces, disproportionately impacts low-income and minority populations, and does not expressly prohibit the use of electronic smoking devices in enclosed workplaces; and

WHEREAS, California cities and counties have the legal authority to adopt local laws that make all indoor places of employment nonsmoking; and

WHEREAS, laws restricting smoking and the use of tobacco products have recognizable benefits to public health and medical costs, and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots

and expressly authorizes local communities to enact additional restrictions; and

WHEREAS, there is no Constitutional right to smoke; and

WHEREAS, this proposed Ordinance will preserve and enhance the environment within the City of El Cerrito and is exempt from the requirements of the California Environmental Quality Act (“CEQA”), as amended, pursuant to Section 15061(b)(3) or Section 15308 of the CEQA Guidelines.

NOW THEREFORE, the City Council of the City of El Cerrito does hereby ordain as follows:

SECTION 2. Amendment of Municipal Code. Title 8 of the El Cerrito Municipal Code is hereby amended to add a new Chapter 8.06 and shall read as follows:

**8.06.010 - Title.**

This Ordinance shall be known as the El Cerrito Smoking Pollution Protection Ordinance. The City of El Cerrito hereinafter shall be called "City." This Ordinance shall be applicable in the incorporated territory of the City.

**8.06.020 - Definitions.**

The following definitions apply to this Ordinance:

- A. “Business” shall mean 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. “Commercial area” means those commercial districts described in chapter 19.07 of the El Cerrito Municipal Code or any property zoned as commercial.
- C. “Dining area” means any indoor or outdoor area, including streets and sidewalks, which is available to or customarily used by the general public or an employee, and which is designed, established, or regularly used for consuming food or drink.
- D. “Electronic smoking device” means an electronic and/or battery-operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substances. “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. “Electronic smoking device” does not include any product specifically

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approved by the United States Food and Drug Administration for use in the mitigation, treatment, or prevention of disease.

- E. "Employee" means any person who is employed or retained as an independent contractor by any employer or nonprofit entity in consideration for direct or indirect monetary wages or profit, or any person who volunteers his or her services for an employer or nonprofit entity.
- F. "Employer" shall mean any person, partnership, corporation, municipal corporation, association, nonprofit or other entity who employs or retains the service of one or more employees, or supervises volunteers.
- G. "Enclosed area" means all space between a floor and ceiling where the space is closed in on all sides by solid walls or windows that extend from the floor to the ceiling. An enclosed area may have openings for ingress and egress, such as doorways or passageways. An enclosed area includes all spaces within that area, such as hallways and areas screened by partitions that do not extend to the ceiling or are not solid.
- H. "Landlord" means any person who owns property let for residential use, who lets residential property, or any person who manages such property, except that "landlord" does not include sublessors.
- I. "Multi-unit residence" means property containing two (2) or more units, including but not limited to apartments, condominiums, duplexes, senior citizen housing, nursing homes, hotels and motels; except the following specifically excluded types of housing:
  - 1. a single-family dwelling as defined in chapter 19.06;
  - 2. a single-family dwelling with a detached or attached in-law or second unit.
- J. "Multi-unit residence common area" shall mean 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, shared patios, shared balconies, shared restrooms, elevators and stairwells, swimming pools, carports, garages, and parking areas.
- K. "Nonprofit entity" shall mean 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

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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.

- L. "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity and including government agencies.
- M. "Place of employment" shall mean 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, residential and commercial 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.
- N. "Playground" shall mean 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.
- O. "Premises" means a piece of land and any improvements upon it such as is usually described in a deed, deed of trust or mortgage.
- P. "Public place" means any area or place, publicly or privately owned, which the public is invited or in which the public is permitted, that is open to the general public regardless of any fee or age requirement.
- Q. "Public sidewalk" means a paved pathway for pedestrians that is publicly owned or in the public right-of-way, including but not limited to within a commercial or residential area.
- R. "Reasonable distance" shall mean 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.

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- S. "Recreational Area" means any area, including streets and sidewalks, that is publicly owned, controlled or used by the City and open to the general public for recreational purposes, regardless of any fee or age requirement. The term "recreational area" includes but is not limited to parks, parklets, picnic areas, playgrounds, sports fields, open space, walking paths, gardens, hiking trails, bike paths, riding trails, swimming pools, and tennis courts.
- T. "Service area" means any publicly or privately owned area, including streets and sidewalks, that is designed to be used or is regularly used by one (1) or more persons to receive a service, wait to receive a service or to make a transaction, whether or not such service or transaction includes the exchange of money. The term "service area" includes but is not limited to areas including or adjacent to information kiosks, automatic teller machines (ATMs), ticket lines, bus stops or shelters, transit stops, mobile vendor lines or taxicab stands.
- U. "Smoke" means the gases, particles, or vapors released into the air as a result of the combustion, electrical ignition, or vaporization of a tobacco product, when the apparent or usual purpose of the combustion, electrical ignition, or vaporization is human inhalation of the tobacco product. "Smoke" includes but is not limited to tobacco smoke, electronic cigarette or electronic smoking device vapors, and marijuana smoke. "Smoke" excludes incense or similar products inhaled solely for olfactory purposes as long as those products do not contain tobacco or nicotine.
- V. "Smoking" means engaging in an act that generates smoke or vapor from a tobacco product, marijuana, or any other weed or plant. "Smoking" includes inhaling, exhaling, burning, possessing, holding, or carrying any lighted cigar, lighted cigarette, lighted pipe, lighted hookah pipe, operating electronic cigarette or electronic smoking device, or any other smoke inhalation device of any kind; "Smoking" includes smoking marijuana for medical purposes.
- W. "Tobacco product" means any of the following:
1. Any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, blunts, clove cigarettes, or any other preparation of tobacco.
  2. Any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter

will be introduced into the human body, including but not limited to electronic cigarettes or electronic smoking devices.

“Tobacco product” does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

- X. “Unenclosed area” means any area that is not an Enclosed Area.
  
- Y. “Unit” means a personal dwelling space consisting of essentially complete independent living facilities for one or more individuals, 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 but is not limited to 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 dwelling; and an in-law or second unit. “Unit” does not include a rented room in a single-family dwelling.

**8.06.030 – City facilities.**

- A. Smoking is prohibited in all buildings, vehicles, and other enclosed areas occupied by City employees, owned or leased by the City, or otherwise operated by the City.
  
- B. Smoking is prohibited in all outdoor areas owned or leased by the City, including parking lots, sidewalks, and the grounds of all buildings, facilities, or areas owned or leased by the City.

**8.06.040 – Prohibition of Smoking in Enclosed Areas.**

- A. In addition to prohibitions under State or Federal law, smoking is prohibited in the enclosed areas of the following places within the City of El Cerrito:
  - 1. Places of employment
  - 2. Public places
  - 3. Multi-unit residence common areas
  - 4. Units within all multi-unit residences
  
- B. Any places exempted by the California smokefree workplace law (Labor Code Section 6404.5(d)) are not exempt under this chapter. Smoking is prohibited by this chapter in all places exempted by that State law.

- C. The prohibitions set out in subsection A.3 and A.4 shall not be operative until October 1, 2015 or at the time of expiration of an existing lease of a unit within the multi-unit residence, whichever is sooner.

**8.06.050 – Prohibition of Smoking in Unenclosed Areas.**

- A. In addition to prohibitions under State or Federal law, smoking is prohibited in the unenclosed areas of the following places within the City of El Cerrito:
  - 1. Throughout all commercial areas
  - 2. Recreational areas
  - 3. Service areas
  - 4. Dining areas
  - 5. Places of employment
  - 6. Multi-unit residence common areas
  - 7. All public sidewalks throughout the City
  - 8. Public events, including but not limited to arts and crafts shows, auctions, civic and community events, fairs, farmers' markets, festivals, flea markets, food events, recreation events, rummage sales, second hand sales, street fairs, and swap meets, or any other event which may be attended by the general public.
- B. Nothing in this chapter prohibits any person, employer, or nonprofit entity with legal control over any property from prohibiting smoking on any part of such property, even if smoking is not otherwise prohibited in that area.
- C. The prohibition set out in subsection A.6 of this section shall not be operative until October 1, 2015.
- D. Smoking is prohibited within a reasonable distance of any enclosed or unenclosed area where smoking is prohibited by this chapter.

**8.06.060 – Other Requirements and Prohibitions.**

- A. Notwithstanding any other provision of this chapter, it shall be a violation of this chapter to use an electronic smoking device in any place within the City subject to the prohibition on smoking contained in this chapter and in California Labor Code section 6404.5, as that section may be amended from time to time.
- B. No person, employer, or nonprofit entity shall knowingly permit smoking or use of tobacco product in an area which is under the legal or de facto control of that person, employer, or nonprofit entity and in which smoking is prohibited by law, unless otherwise required by state or federal law.



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- C. No person, employer, 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 under the legal or de facto control of that person, employer, or nonprofit entity and in which smoking or use of tobacco product is prohibited by law. Notwithstanding the foregoing, the presence of ash receptacles in violation of this subsection shall not be a defense to a charge of smoking or use of tobacco product in violation of any provision of this chapter.
  
- D. A person, employer, or nonprofit entity that has legal or de facto control of an area in which smoking is prohibited by this chapter shall post a clear, conspicuous and unambiguous “No Smoking” or “Smokefree” sign at each point of ingress to the area, and in at least one other conspicuous point within the area. The signs shall have letters of no less than one inch in height and shall include the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it. Notwithstanding the above, for purposes of this section, the City Manager or his/her designee shall be responsible for the posting of a reasonable number of signs in recreational areas owned, leased in whole or in part by the City. Notwithstanding this provision, the absence of signs shall not be a defense to a charge of smoking or the use of tobacco products in violation of any other provision of this chapter.
  
- E. With respect to each multi-unit residence, the owner, in cases where the units may not be sold individually, or the person responsible for maintenance of the common area, in cases where the units may be sold individually, shall:
  - 1. Within thirty (30) days of the effective date of this section, notify the occupants and owners of units in writing by mail or delivery to the unit of the prohibitions imposed by this chapter.
  
  - 2. Post "No Smoking" or “Smokefree” 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 crossed by a red bar) indicate that smoking is prohibited within units in the multi-unit residence and within the common area shall be clearly and conspicuously posted in multi-unit residence common areas and at entrances and exits. Such signs shall be maintained by the person or persons with legal control over the multi-unit residence common areas and entrances and exits. Signs must be posted in sufficient numbers and

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locations in the multi-unit residence common areas and at entrances and exits to make areas where smoking is prohibited obvious to a reasonable person. Signs are not required at the individual entrance and exits of each multi-unit residence. The absence of signs shall not be a defense to a charge of violation of any provision of this chapter.

- F. Every lease or other agreement for the occupancy of a unit in a multi-unit residence entered into, amended, or renewed shall include:
  - 1. A clause stating that smoking is prohibited in the unit
  - 2. A clause stating that it is a material breach of the lease or agreement to violate any law regulating smoking while on the premises, smoke in the unit, or smoke in any multi-unit residence common area in which smoking is prohibited
  - 3. A clause stating that all occupants of the multi-unit residence are express third-party beneficiaries of the above required clauses.
  - 4. A form prepared by an entity such as the California Apartment Association Form 34 meets the requirements for lease terms as outlined and is an option for use to comply with this section.
  
- G. A tenant who breaches the smoking regulations of a lease or knowingly allows another person to do so shall be liable to: the landlord, and any occupant of the multi-unit residence who is exposed to secondhand smoke as a result of that breach.
  
- H. This chapter shall not create additional liability for a landlord for a person's violation of this chapter provided that the landlord has fully complied with the required disclosure, sign posting, and other provisions of this chapter.
  
- I. No person, employer, or nonprofit entity shall intimidate, threaten any reprisal, or effect any reprisal, for the purpose of retaliating against another person who seeks to attain compliance with this chapter.
  
- J. Each instance of smoking in violation of this chapter shall constitute a separate violation. For violations other than for smoking, each day of a continuing violation of this chapter shall constitute a separate violation.

### **8.06.070 – Enforcement and Violation – Penalty.**

- A. Any violation of this ordinance is punishable as specified in Chapters 1.08 or 1.14 of the El Cerrito Municipal Code or by any other applicable law.

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- B. The City Manager or his or her designee has primary responsibility for enforcement of this Ordinance. Any peace officer or Code Enforcement Official also may enforce this chapter.
- C. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.
- D. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.
- E. Any Person may act as a Private Enforcer, acting for the interests of itself, its members, or the general public may bring a civil action in any court of competent jurisdiction, including small claims court, to enforce this chapter against any Person who has violated this chapter two or more times. Upon proof of the violations, a court shall grant all appropriate relief, including: (1) awarding damages; and (2) issuing an injunction or a conditional judgment.

### SECTION 3. Compliance with the California Environmental Quality Act.

Pursuant to Title 14 of the California Administrative Code, the City Council finds that this Ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) for the following reasons: (1) under Section 15061 (b)(3), it is not a project which has the potential for causing a significant effect on the environment; (2) under Section 15308, it is an authorized action by an agency with regulatory authority for the purpose of assuring the maintenance, restoration, enhancement, or protection of the environment.

### SECTION 4. Severability.

If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the Ordinance. The City Council of the City of El Cerrito hereby declares that it would have passed this Ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this Ordinance would be subsequently declared invalid.

### SECTION 5. No Conflict with Federal or State Law.

Nothing in this Ordinance is intended to create any requirement, power or duty that is in conflict with any federal or state law.

SECTION 6. Effective Date.

This ordinance shall take effect and be enforced January 1, 2015, and prior to the expiration of fifteen days from the passage thereof, the ordinance or a summary thereof shall be posted or published as may be required by law, and thereafter the same shall be in full force and effect.

THE FOREGOING Ordinance was introduced at a regular meeting of the City Council on August 19, 2014, and passed by the following vote:

AYES: Councilmembers Benassini, Bridges, Friedman, Lyman and Mayor  
Abelson  
NOES: None  
ABSTAIN: None  
ABSENT: None

ADOPTED AND ORDERED published at a regular meeting of the City Council held on the October \_\_\_\_, 2014 and passed by the following vote:

AYES:  
NOES:  
ABSTAIN:  
ABSENT:

APPROVED:

\_\_\_\_\_  
Janet Abelson, Mayor

ATTEST:

\_\_\_\_\_  
Cheryl Morse, City Clerk

IN WITNESS of this action, I sign this document and affix the corporate seal of the City of El Cerrito on October XX, 2014.

\_\_\_\_\_  
Cheryl Morse, City Clerk

**ORDINANCE CERTIFICATION**

I, Cheryl More, City Clerk of the City of El Cerrito, do hereby certify that this Ordinance is the true and correct original Ordinance No. 2014-XX of the City of El Cerrito, that said Ordinance was duly enacted and adopted by the City Council of the City of El Cerrito at a meeting of the City Council held on the \_\_\_ day of October 2014; and that said ordinance has been published and/or posted in the manner required by law.

WITNESS my hand and the Official Seal of the City of El Cerrito, California, this day of October \_\_\_, 2014.

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Cheryl Morse, City Clerk