

**ORDINANCE NO. \_\_\_\_\_**

**Ordinance Of The City Council Of The City Of Emeryville Amending Sections 5-29.02 And 5-29.09 Of Chapter 29, ("Smoking Pollution Control"), Of Title 5 Of The Emeryville Municipal Code To Add And Revise The Definitions For Certain Terms And Repeal The Exception For Private Smokers' Lounges; And Authorizing The City Manager To Take Actions Related To Implementation And Enforcement; CEQA Determination: Exempt Pursuant To Guideline Sections 15378 And 15061(b)(3)**

**WHEREAS**, the State of California finds that smoking in the workplace is a 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**, *City of San Jose v. Department of Health Services* (1998) 66 Cal.App.4<sup>th</sup> 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; and

**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, are well-documented; and

**WHEREAS**, on September 17, 2018, the City Council adopted Ordinance 18-003 repealing and replacing Chapter 29, of Title 5 of the Emeryville Municipal Code, "Smoking Pollution Control Ordinance"; and

**WHEREAS**, City staff wants to now add and amend definitions provided in the Ordinance; and

**WHEREAS**, one exception to the restriction on smoking in public places in the City of Emeryville is for private smokers' lounges; and

**WHEREAS**, the City Council has determined that it no longer wants to permit such an exception given the health hazards associated with smoking; and

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF EMERYVILLE DOES HEREBY ORDAIN AS FOLLOWS:**

**SECTION ONE.     PURPOSE AND FINDINGS.**

The above recitals being true and correct and incorporated by reference, the purpose and intent of this Ordinance is to add and amend the definitions in Section 5-29.02 and amend Section 5-29.09 of Chapter 29 of Title 5 of the Emeryville Municipal Code to repeal the exception for private smokers' lounges from the City's Smoking Pollution Control Ordinance to improve public health, safety, and quality of life.

**SECTION TWO.     AMENDING TITLE 5, CHAPTER 29, "SMOKING POLLUTION**

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## **CONTROL" TO THE EMERYVILLE MUNICIPAL CODE**

Chapter 29, "Smoking Pollution Control," of the Emeryville Municipal Code is hereby amended as follows:

### **5-29.02 Definitions.**

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

(a) Cannabis. See Section 5-28.03(b) or its successor section of the Emeryville Municipal Code.

(b) "Cigar" means any roll of tobacco that is wrapped in tobacco leaf or any other substance containing tobacco, with or without a tip or mouthpiece including, but not limited to, Tobacco Products known or labeled as cigar, cigarillo, little cigar, blunt, blunt wrap, or cigar wrap.

(c) "Cigarette" means any roll of tobacco wrapped in paper or in any substance not containing tobacco, and any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described herein.

(bd) "Common area" means every enclosed area and every unenclosed area of a multi-unit residence that residents of more than one (1) 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.

(ce) "Electronic smoking device" means an electronic device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah including any component, part, of accessory of the device and any substance that may be aerosolized or vaporized by such a device, whether or not the substance contains nicotine. "Electronic smoking device" does not include drugs, devices, or combination of products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the

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federal Food, Drug, and Cosmetic Act, or Cannabis or Cannabis product as defined in Section 5-28.03 of Chapter 28 of Title 5 ("Cannabis") of the Emeryville Municipal Code  
~~can be used to deliver an inhaled dose of nicotine 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.~~

(df) "Enclosed area" means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has: (1) any type of overhead cover, whether or not that cover includes vents or other openings and at least three (3) walls or other physical boundaries of any height, whether or not those boundaries include vents or other openings; or (2) four (4) walls or other vertical boundaries that exceed six (6) feet in height, whether or not those boundaries include vents or other openings.

(eg) "Multi-unit residence" means residential property containing two (2) or more units, with one (1) 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 residential care facility or assisted living facility where smoking is governed by Federal or State community care licensing regulations; or a single-family residence, including one which has a detached permitted accessory dwelling unit on the same lot, unless the single-family residence is used as a day care center.

(fh) "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 arenas, 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 and dispensary/retailer operator's permit pursuant to Chapter 28 of Title 5.

(gi) "Reasonable distance" means a distance of twenty-five feet (25') from any smoke-free area that ensures that occupants of an area in which smoking is prohibited are not exposed to secondhand smoke created by smokers outside the area.

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(h*j*) “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*k*) “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, and the smoke exhaled by an individual who engages in smoking as defined in this section.

(j*l*) “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 taxicab depots.

(k*m*) “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, tobacco product, or nicotine, and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “smoke” includes, but is not limited to, tobacco smoke, electronic smoking device vapors, cannabis smoke, and crack cocaine smoke.

(l*n*) “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 tobacco product, intended for human inhalation.

(m*o*) “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

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premises, even where incidental to stated purpose. Excludes a place that has a cannabis sales conditional use permit pursuant to Title 9 that allows for smoking.

(~~np~~) “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.

(~~eq~~) “Tobacco product” means any product, whether natural or synthetic, 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.

(~~pr~~) “Unenclosed area” means any area that is not an enclosed area.

(~~qs~~) “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.

#### **5-29.09 Smoking Lounges Prohibited.**

Smoking shall be prohibited in any smoking lounge within the City of Emeryville ~~unless such smoking lounge constitutes a private smokers’ lounge at an owner-operated retail or wholesale tobacco shop under Labor Code Section 6404.5 and such smoking lounge does not share a wall, ceiling or floor with a multi-unit residence, public place or any area identified in Section 5-29.04(b).~~

### **SECTION THREE. SEVERABILITY**

The City Council of the City of Emeryville declares that each section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance is severable and independent of every other section, sub-section,

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paragraph, sub-paragraph, sentence, clause and phrase of this ordinance. If any section, sub-section, paragraph, sub-paragraph, sentence, clause or phrase of this ordinance is held invalid, the City declares that it would have adopted the remaining provisions of this ordinance irrespective of the portion held invalid, and further declares its express intent that the remaining portions of this ordinance should remain in effect after the invalid portion has been eliminated.

#### **SECTION FOUR. CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATION**

This ordinance is exempt from the California Environmental Quality Act pursuant to CEQA Guidelines section 15378 because it is not a “project” because it has no potential for resulting in a direct or indirect physical change in the environment; it is merely an administrative action repealing an exception to existing smoking regulations and involves no authorization of any construction or other activities that could impact the environment. Further, this ordinance is exempt pursuant to CEQA Guidelines section 15061(b)(3) because it can be seen with certainty that there is no possibility that these amendments to the Emeryville Municipal Code will have a significant effect on the environment.

#### **SECTION FIVE. EFFECTIVE DATE**

This Ordinance shall take effect 30 days following its final passage. The City Clerk is directed to cause copies of this Ordinance to be posted or published as required by Government Code section 36933.

#### **SECTION SIX. CODIFICATION**

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

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This Ordinance was **INTRODUCED AND FIRST READ** by the City Council of the City of Emeryville at a regular meeting held Tuesday, April 16, 2024, and **PASSED AND ADOPTED** by the City Council of the City of Emeryville at a regular meeting held Tuesday, May 7, 2024, by the following vote:

AYES: \_\_\_\_\_  
NOES: \_\_\_\_\_  
ABSTAIN: \_\_\_\_\_  
ABSENT: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
CITY CLERK

\_\_\_\_\_  
MAYOR

APPROVED AS TO FORM:

DocuSigned by:  
*John Kennedy*  
2C994D02BB55467...  
\_\_\_\_\_  
CITY ATTORNEY