

PLEASE NOTE:

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REGULAR

NUMBER: 227.8

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS AMENDING CHAPTER 215 OF TITLE V OF THE MILPITAS MUNICIPAL CODE RELATING TO PROHIBITING SMOKING IN MULTI-UNIT HOUSING AND CERTAIN OUTDOOR AREAS

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of _____, upon motion by _____ and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Wendy Wood, City Clerk

Rich Tran, Mayor

APPROVED AS TO FORM:

Christopher J. Diaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, the City of Milpitas (the “City”) is a municipal corporation, duly organized under the constitution and laws of the State of California; and

WHEREAS, the U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and the California Air Resources Board identified secondhand smoke as a toxic air contaminant for which there is no safe level of exposure; and

WHEREAS, secondhand smoke is responsible for an estimated 34,000 heart disease–related and 7,300 lung cancer–related deaths among adult nonsmokers each year; and

WHEREAS, in children, secondhand smoke causes ear infections, more frequent and severe asthma attacks, respiratory infections, and increases the risk of Sudden Infant Death Syndrome (SIDS); and

WHEREAS, exposure to electronic smoking device aerosol has immediate impacts on the human respiratory and cardiovascular system and poses a risk to human health; and

WHEREAS, secondhand cannabis smoke has been identified as a health hazard; the California Environmental Protection Agency includes cannabis smoking on the Proposition 65 list of chemicals known to the state to cause cancer; and

WHEREAS, studies have shown that exposure to secondhand smoke outdoors can reach levels attained indoors depending on the amount of wind and number and proximity of smokers; and

WHEREAS, research demonstrates that secondhand smoke in multi-unit housing can and does transfer between units, creeping under doorways and through wall cracks; and

WHEREAS, according to the County of Santa Clara, close to one-third (29%) of adults who live in multi-unit housing in the County reported smelling tobacco smoke drifting into their home in the previous week. The rate of secondhand smoke exposure was higher among those with less than a high school diploma (38%) and adults with household incomes less than \$15,000 (36%); and

WHEREAS, harmful residues from tobacco smoke can be absorbed by and cling to virtually all indoor surfaces long after smoking has stopped and then be emitted back into the air, making this “thirdhand smoke” a potential health hazard; and

WHEREAS, California cities and counties have the legal authority to adopt local laws that prohibit all tobacco use indoors and outdoors in areas not already covered by state law; and

WHEREAS, state law allows local governments to adopt ordinances that permit residential rental agreements to prohibit smoking tobacco products within rental units; and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds as well as within 20 feet of government buildings and expressly authorizes local communities to enact additional restrictions; and

WHEREAS, the City of Milpitas currently prohibits smoking in recreational areas; outdoor dining areas; and within 25 feet of government buildings; and

WHEREAS, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around non-tobacco users, especially children, to protect the public from exposure to secondhand smoke where they live, work, and play, and to protect the public from nonconsensual exposure to secondhand smoke in and around their homes, the City desires to amend and add new sections to Chapter 215 of Title V of the Milpitas Municipal Code relating to smoking within multi-unit housing, public places, service areas, and outdoor dining areas.

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF MILPITAS MUNICIPAL CODE TITLE V, CHAPTER 215

Chapter 215 (Regulation of Smoking in Certain Places) of Title V of the Milpitas Municipal Code is hereby amended to read as follows:

Chapter 215 - REGULATION OF SMOKING IN CERTAIN PLACES

V-215-1.10 Purpose

The City Council of the City of Milpitas recognizes the right and need of those who wish to breathe fresh air ~~while working, engaging in play or athletic activity, or while dining.~~ In order to serve the public health, safety and general welfare, the purpose of this Chapter is to prohibit smoking in the areas defined herein with some exceptions. The City Council hereby adopts and incorporates as if set out at length herein, California Labor Code Section 6404.5, and California Health and Safety Code Sections 104495 and 114371; and California Government Code Sections 7596-7598, as now written and as amended from time to time. A copy of ~~California Labor Code Section 6404.5 and California Health and Safety Code Section 104495~~ these laws shall be available for inspection during regular business hours in the office of the City Clerk.

V-215-1.15 Definitions

~~This Chapter is hereby enacted to include the following definitions:~~ The following words and phrases, whenever used in this Chapter, shall be construed as defined in this Section:

- (a) “Common area” shall mean every enclosed area or unenclosed area of a multi-unit residence that residents of more than one unit are entitled to enter or use, including, but not limited to, halls, pathways, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, grassy or landscaped areas, restrooms, laundry rooms, cooking areas, and eating areas.
- (~~a~~b) “Electronic smoking device” shall mean an electronic and/or battery-operated device, the use of which may resemble smoking which can be used to deliver any aerosolized or vaporized substance to the person inhaling from the device ~~an inhaled dose of nicotine or other substances.~~ “Electronic smoking device” includes but is not limited to any such electronic smoking devices, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, vape pen, or any other product name or descriptor.
- (c) “Enclosed area” shall mean all space between a floor and a ceiling that is bounded by walls, doorways, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent.
- (d) “Landlord” shall mean any person or agent of a person who owns, manages, or is otherwise legally responsible for a unit in a multi-unit residence that is leased to a residential tenant. For purposes of this Chapter, a tenant who sublets a unit (e.g., a sublessor) is not a landlord.
- (e) “Multi-unit residence” shall mean property containing two or more attached units, including, but not limited to, apartment buildings, condominiums, duplexes and triplexes, senior and assisted living facilities, and long-term health care facilities. Multi-unit residences do not include the following:
 - 1. a hotel or motel that meets the requirements of California Civil Code Section 1940(b)(2);
 - 2. a mobile home park;
 - 3. a campground;

4. a marina or port;
5. a single-family home, except if used as a health care facility subject to licensing requirements; and
6. a single-family home with a with a detached or attached ~~in-law~~ accessory dwelling unit or second unit permitted pursuant to California Government Code Sections 65852.1, 65852.150, 65852.2, or an ordinance of the City adopted pursuant to those sections, except if the single-family home or ~~in-law~~ accessory dwelling unit/second unit is used as a health care facility subject to licensing requirements.

(f) “Nonsmoking area” shall mean any area in which smoking is prohibited by

1. this Chapter or other law;
2. binding agreement relating to the ownership, occupancy, or use of real property; or
3. a person with legal control over the area.

(~~h~~g) "Outdoor dining area" shall mean any privately owned or publicly owned area, street, or sidewalk, which is available or customarily used by the general public and which is designed, established, or regularly used for consuming food or drink.

(h) “Person” shall mean any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, including government agencies.

(i) “Place of employment” shall mean any area under the legal or de facto control of an employer that an employee or the general public may have cause to enter in the normal course of the operations, regardless of the hours of operations.

(j) “Public place” shall mean any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement.

~~(c) "Public facility" shall mean any building owned or leased by the City of Milpitas, including city vehicles.~~

(~~d~~k) "Reasonable distance" shall mean a distance of 25 feet in any direction from an area in which smoking is prohibited.

(~~e~~l) "Recreational area" shall mean any outdoor area, including streets and sidewalks adjacent to recreational areas, owned or operated by the City of Milpitas 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, picnic areas, playgrounds, sports fields, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, skateboard parks, and bleacher areas, spectator seating areas, concession stands, parking lots or other areas designated or primarily used for parking vehicles of persons accessing a recreational area.

(m) “Service area” shall mean any publicly or privately owned area, including streets and sidewalks, that is designed to be used or is regularly used by one 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, mobile vendor lines, or cab stands.

(~~f~~n) “Smoke” shall mean 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. The term “smoke” includes, but is not limited to tobacco smoke, electronic smoking device vapors, and marijuana smoke.

(~~g~~o) “Smoking” shall mean: ~~engaging in an act that generates smoke, including but not limited to igniting, lighting or possession of a lighted pipe, cigar, hookah water pipe, cigarette of any kind, an operating electronic smoking device or lighted smoke inhalation device of any kind that generates smoke of any kind.~~

1. inhaling, exhaling, or burning, any tobacco, nicotine, cannabis, or plant product, whether natural or synthetic, including a pipe, cigar, cigarillo, hookah water pipe, or cigarette of any kind;

2. carrying any lighted, heated, or activated tobacco, nicotine, marijuana, or plant product, whether natural or synthetic, intended for inhalation; or

3. using an “electronic smoking device.”

(p) “Unenclosed Area” shall mean any area that is not an enclosed area.

(q) “Unit” shall mean a personal dwelling space, 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, without limitation, an apartment; a condominium; a townhouse; a room in a senior facility; a room in a long-term health care facility, assisted living facility, community care facility, or hospital; a room in a hotel or motel; a dormitory room; a room in a single-room occupancy facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an accessory dwelling unit or second unit.

V-215-1.20 Smoking Prohibited

(a) Smoking is prohibited in the enclosed areas of the following places within the City:

1. Places of employment; and

2. Public places

(b) Smoking is prohibited in the unenclosed areas of the following places within the City:

~~1. Within a reasonable distance of entrances, exits, open windows, and ventilation intake systems of any public facility;~~

~~2. In recreational areas;~~

~~3. In outdoor dining areas;~~

3. Service areas; and

4. Public places, when being used for a public event, including a farmer’s market, parade, craft fair, or any event which may be open to or attended by the general public, provided that smoking is permitted on streets and sidewalks being used in a traditional capacity as pedestrian or vehicular thoroughfares, unless otherwise prohibited by this Chapter or other law.

~~(b)~~ (c) Reasonable Distance Required for Smoking.

1. Smoking is prohibited within a reasonable distance of entrances, exits, open windows, and ventilation intake systems into an enclosed area in which smoking is prohibited under Section V-215-1.20(a), except while actively passing on the way to another destination and provided smoke does not enter any area in which smoking is prohibited.;

~~2.~~ Smoking in all unenclosed areas is prohibited within a reasonable distance from any unenclosed areas in which smoking is prohibited under Section V-215-1.20-(a), except while actively passing on the way to another destination and provided smoke does not enter any area in which smoking is prohibited.

~~3.~~ The smoking prohibitions in Section V-215-1.20-(c)(2) shall not apply to unenclosed areas on private residential properties that are not multi-unit residences.

(d) Nothing in this Chapter shall be construed to prohibit smoking in any area in which such smoking is already prohibited by State or federal law unless the applicable State or federal law does not preempt additional local regulation.

(e) No person shall dispose of used smoking waste within the boundaries of an area in which smoking is prohibited by this Chapter.

V-215-1.25 Smoking—Optional Areas

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

- (a) On-stage smoking as part of a stage production, or similar exhibition in a public facility.
- (b) Any public area where smoking is permitted or is not otherwise prohibited by this Chapter.
- (c) A private residence that is not a multi-unit residence. ~~Private property except where such property meets the definition of outdoor dining area.~~

V-215-1.30 Smoking in Multi-Unit Housing

- (a) Beginning January 1, 2022, no person shall smoke inside any new or existing unit of a multi-unit residence, in any enclosed or unenclosed common area of a multi-unit residence, or within a reasonable distance of any operable doorway, window, opening, or vent of a multi-unit residence.
- (b) Smoking is prohibited in multi-unit residences as provided in subsection (a) of this Section, except that a person with legal control over a common area, or authorized representative, may designate a portion of the common area as a designated smoking area; provided, that at all times the designated smoking area complies with subsection (c) of this Section.
- (c) Designated smoking areas in multi-unit residences. A designated smoking area shall:
 - 1. Be an unenclosed area;
 - 2. Be a reasonable distance from unenclosed areas primarily used by children and unenclosed areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, and school campuses;
 - 3. Be a reasonable distance in any direction from any operable doorway, window, opening or other vent into an enclosed area that is located at the multi-unit residence and is a nonsmoking area;
 - 4. Have a clearly marked perimeter;
 - 5. Have receptacles designed for and primarily used for disposal of tobacco waste and that are maintained free of tobacco-related litter including, but not limited to, cigarette butts; and
 - 6. Be identified by conspicuous signs.
- (d) Smoking and the use of electronic smoking devices is prohibited in adjacent unenclosed property within a reasonable distance in any direction of any doorway, window, opening, or other vent into an enclosed area of a multi-unit residence.
- (e) Common Areas Free from Smoking Waste. Persons with legal control over common areas in multi-unit residences, and their authorized representatives, shall ensure that all common areas except those meeting the requirements of subsection (c) of this Section remain free of smoking and tobacco waste, and ash trays, ash cans, or other receptacles designed for or primarily used for disposal of smoking and tobacco waste.
- (f) Signage. "No Smoking" signs shall be posted as required by Section V-215-1.35 of this Chapter, but are not required inside any unit of a multi-unit residence. Signs shall be maintained by the person or persons with legal control over the common areas or the authorized representative of such person.
- (g) Lease Terms. Every lease or other rental agreement for the occupancy of a new or existing unit in a multi-unit residence entered into, renewed, or continued month-to-month after January 1, 2022 shall include the following:
 - 1. A clause providing that it is a material breach of the agreement to smoke or allow smoking:
 - i. in the unit, including exclusive-use areas such as balconies, porches, or patios; and
 - ii. in any common area of the multi-unit residence other than a designated smoking area.
 - 2. A description of and/or image depicting the location(s) of any designated smoking area(s) on the property, if any.
 - 3. A clause expressly conveying third-party beneficiary status to all occupants of the multi-unit residence as to the smoking provisions of the lease or other rental agreement. Such a clause shall provide that any tenant

of the multi-unit residence may sue another tenant/owner to enforce the smoking provisions of the agreement but that no tenant shall have the right to evict another tenant for a breach of the smoking provisions of the agreement.

- (h) Whether or not a landlord complies with subsection (g) of this Section, the clauses required by that subsection shall be implied and incorporated by law into every agreement to which subsection (g) of this Section applies and shall become effective as of the earliest possible date on which the landlord could have made the insertions pursuant to subsection (g) of this Section.
- (i) This Chapter shall not create additional liability for a landlord to any person for a tenant's breach of any smoking provision in a lease or other rental agreement for the occupancy of a unit in a multi-unit residence if the landlord has fully complied with the provisions of this Chapter, except as otherwise allowed by applicable State law.
- (j) Failure to enforce any smoking provision required by this Chapter shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision itself.

V-215-1.30 5 **Posting of Signs**

"Smoking" or "No Smoking" signs, whichever are appropriate, with letters of not 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 or outside of every building or other place where smoking is controlled by this Chapter, by the owner, operator, manager, or other person having control of such building or other place. When a sign is posed on the exterior of a building to indicate "No Smoking," it shall include the distance limitations contained in this Chapter. Signs are not required inside any unit of a multi-unit residence. Notwithstanding this provision, the presence or absence of signs shall not be a defense to a charge of smoking in violation of any provision of this Chapter.

V-215-1.40 Inspection

The City Manager, or his or her designee(s), shall have the authority to enforce the provisions of this Chapter. Such enforcement shall include the right to enter places of employment or any playground or sports facility, as defined in California Labor Code Section 6404.5₂ and California Health and Safety Code, Section 104495; at any time a City owned and/or operated facility is open to the public, or during regular business hours for the purpose of making reasonable inspections to observe and enforce compliance with this Chapter.

V-215-1.50 45 **Penalty**

- (a) In addition to any other remedy available at law, the City may enforce any violation of this Chapter pursuant to Section I-1-4.09 of the Milpitas Municipal Code or by administrative citation pursuant to Title I, Chapter 21 of the Milpitas Municipal Code. ~~Any persons violating Section V-215-1.20 or Section V-215-1.30 any provision of this Chapter shall be guilty of an infraction and, upon conviction, shall be punished in accordance with the penalties set forth in Section I-1-4.09-1 of the Milpitas Municipal Code, punishable by a fine of \$250.00 for each violation of this Section.~~
- (b) Each instance of smoking in violation of this Chapter shall constitute a separate violation. For violations other than smoking, each day of a continuing violation of this Chapter shall constitute a separate violation.
- (c) Any violation of this Chapter is hereby declared to be a public nuisance.
- (d) In addition to other remedies provided by this Chapter or otherwise available at law or in equity, any violation of this Chapter may be remedied by a civil action brought by the eCity aAttorney, including, without limitation, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief.
- (e) Any person may bring a civil action to enforce this Chapter to prevent future violations and may sue to recover actual or statutory damages, including court costs, and attorney fees.
- (f) Owners, operators, property managers, and officers of homeowners' associations for residential properties, whether rental or owner-occupied, are required to post signs in accordance with Section V-215-1.35 and provide

notice to residents or tenants of the requirements of this Chapter. Owners, operators, and property managers of rental property must include the requirements of Section V-215-1.30 in the lease or other rental agreement. If the owners, operators, property managers, and officers of rental property and homeowners' associations for residential properties have satisfied these requirements, they shall not be responsible for violations of the requirements of this Chapter by tenants or residents, or guests of tenants or residents.

~~(a)~~(g) An owner, operator, or manager ("owner") of a commercial establishment shall not be responsible for violations of this Chapter within an area under the owner's control, by a patron or other member of the public ("patron"); provided, that the owner:

1. Has posted signs in accordance with this Chapter; and
2. Has verbally asked the patron not to smoke.

This limitation shall not limit the liability of an employer for the actions of employees in places of employment, or any other violation of this Chapter by the employer.

V-215-1.150 Nonretaliation

No person or employer shall discharge, refuse to hire on, or in any manner retaliate against any employee or applicant for employment because such employee or applicant makes a complaint regarding violation of this Chapter or exercises any rights granted to him or her under this Chapter. No person or landlord shall terminate a tenancy, or modify the terms of a tenancy, or in any manner retaliate against any tenant because such tenant makes a complaint regarding violation of this Chapter or exercises any rights granted to him or her under this Chapter.

SECTION 3. CEQA

The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this Ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

SECTION 4. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 5. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. However, Section V-215-1.30 shall not become operative until January 1, 2022. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.