

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CUPERTINO
AMENDING CITY CODE CHAPTER 10.90 OF TITLE 10 (PUBLIC PEACE, SAFETY,
AND MORALS) TO PROHIBIT SMOKING IN MULTI-UNIT HOUSING AND
CERTAIN OUTDOOR AREAS**

The City Council of the City of Cupertino finds that:

1. The purpose of this Chapter is to: (a) To protect public health, safety, and general welfare by prohibiting smoking in multi-unit housing, public places, recreational areas, service areas, outdoor dining and various other locations set forth in this chapter; (b) To reduce litter, waste and pollution; and (c) To reduce exposure to secondhand smoke, which has been shown to cause negative health effects.
2. 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.
3. Secondhand smoke is responsible for an estimated 34,000 heart disease-related and 7,300 lung cancer-related deaths among adult nonsmokers each year.
4. 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).
5. Exposure to electronic smoking device aerosol has immediate impacts on the human respiratory and cardiovascular system and poses a risk to human health.
6. 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.
7. 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.

8. Research demonstrates that secondhand smoke in multi-unit housing can and does transfer between units, creeping under doorways and through wall cracks.
9. According to the County, 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%).
10. 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.
11. 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.
12. State law allows local governments to adopt ordinances that permit residential rental agreements to prohibit smoking tobacco products within rental units.
13. 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.
14. Cupertino prohibits smoking in recreational areas owned or operated by the City; outdoor dining areas; at entrances and exits of places where food and drink is served; and within 25 feet of these areas.
15. The City Council of the City of Cupertino held a duly noticed public meeting on May 4, 2021, and after considering all testimony and written materials provided in connection with that meeting introduced this ordinance and waived the reading thereof.

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

SECTION 1. Adoption.

The Cupertino Municipal Code is hereby amended as set forth in Attachment A.

SECTION 2: Severability and Continuity.

The City Council 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, 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, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, the City Council declares that it would have adopted the remaining provisions of this ordinance irrespective of such portion, and further declares its express intent that the remaining portions of this ordinance should remain in effect after the invalid portion has been eliminated. To the extent the provisions of this Ordinance are substantially the same as previous provisions of the Cupertino Municipal Code, these provisions shall be construed as continuations of those provisions and not as an amendment to or readoption of the earlier provisions.

SECTION 3: California Environmental Quality Act.

This Ordinance is not a project under the requirements of the California Quality Act of 1970, together with related State CEQA Guidelines (collectively, "CEQA") because it has no potential for resulting in physical change in the environment, either directly or ultimately. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility of a significant effect on the environment. CEQA applies only to projects which have the potential of causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. In this circumstance, the amendments to the City Code would have no or only a de minimis impact on the environment. The foregoing determination is made by the City Council in its independent judgment.

SECTION 4: Effective Date.

This Ordinance shall take effect thirty days after adoption as provided by Government Code Section 36937. However, the Ordinance's requirements shall not become operative until October 1, 2021, which means that the City, or its designee, will not begin to enforce the provisions and penalties under the Ordinance until October 1, 2021.

SECTION 5: Publication.

The City Clerk shall give notice of adoption of this Ordinance as required by law. Pursuant to Government Code Section 36933, a summary of this Ordinance may be prepared by the City Clerk and published in lieu of publication of the entire text. The City Clerk shall post in the office of the City Clerk a certified copy of the full text of the Ordinance listing the names of the City Council members voting for and against the ordinance.

INTRODUCED at a regular meeting of the Cupertino City Council on May 4th, 2021 and **ENACTED** at a regular meeting of the Cupertino City Council on May 18th, 2021 by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED: _____ Darcy Paul, Mayor City of Cupertino	 _____ Date
ATTEST: _____ Kirsten Squarcia, City Clerk	 _____ Date
APPROVED AS TO FORM: _____ Heather Minner, City Attorney	 _____ Date

Attachment A – An ordinance to prohibit smoking in multi-unit housing and certain outdoor areas

The sections of the Cupertino Municipal Code set forth below are amended or adopted as follows:

*Text added to existing provisions is shown in bold double-underlined text (**example**) and text to be deleted is shown in strikethrough (~~example~~). Text in existing provisions is not amended or readopted by this Ordinance. Text in italics is explanatory and is not an amendment to the Code.*

Where the explanatory text indicates that a new section is being added to the City Code, the new section is shown in plain text.

1. Amendments to Article 10.90 concerning Regulation of Smoking

10.90.010 Definitions.

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this chapter unless the context clearly requires otherwise:

~~A. “Outdoor Dining Area” means 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.~~

A. “Business” means any sole proprietorship, partnership, joint venture, corporation, association, landlord, or other entity formed for profit-making purposes. A Business also includes owner-operated entities with no Employees in which the owner is the only worker.

B. “Common Area” means every 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.

C. “Dining Area” means any privately owned or publicly owned area, street, or sidewalk, which is available 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 any 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.

E. "Employee" means any Person who is employed or retained as an independent contractor by any Employer in consideration for direct or indirect monetary wages or profit, or any Person who volunteers his or her services for an Employer.

F. "Employer" means any Business or Nonprofit Entity that retains the service of one or more Employees.

G. "Enclosed area" means 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.

H. "Landlord" means 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 ordinance, a tenant who sublets their unit (e.g., a sublessor) is not a landlord.

I. "Multi-unit Residence" means property containing two or more attached units, including, but not limited to, apartment buildings, condominiums, duplexes and triplexes, attached single-family homes, senior and assisted living facilities, and long-term health care facilities. "Multi-unit Residence" also includes single-family homes with an attached or detached accessory dwelling unit, junior accessory dwelling unit, or second unit. "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; and
5. a detached single-family home without an attached or detached accessory dwelling unit, junior accessory dwelling unit, or second unit.

J. "Nonprofit Entity" means any entity that meets the requirements of California Corporations Code section 5003 as well as any corporation, unincorporated association, or other entity created for charitable, religious, philanthropic, educational, political, social, or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A government agency is not a Nonprofit Entity within the meaning of this chapter.

K. "Nonsmoking Area" means 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.

L. "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, including government agencies.

M. "Place of Employment" means 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 operation.

N. "Public Place" means any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement.

O.—B. "Reasonable distance" means a distance of ~~25~~30 feet in any direction from an area in which smoking is prohibited.

P. ~~C.~~ "Recreational Area" means any outdoor area, including streets and sidewalks adjacent to Recreational ~~a~~Areas, owned or operated by the City of Cupertino 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, golf courses, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, roller-skating rinks, and skateboard parks, and parking lot or other area designated or primarily used for parking vehicles of persons accessing a Recreational Area.

Q. "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 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.

R. ~~D.~~ "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 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, vapors from an electronic smoking device, and marijuana smoke.

S. ~~E.~~ "Smoking" means: ~~engaging in an act that generates Smoke, such as for example: possessing a lighted pipe, lighted hookah pipe, a lighted cigar, or a lighted~~

cigarette of any kind; or; or lighting or igniting of a pipe, cigar, hookah pipe, or cigarette of any kind.

1. inhaling, exhaling, or burning, any tobacco, nicotine, cannabis, or plant product, whether natural or synthetic;
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."

T. "Unenclosed Area" means any area that is not an enclosed area.

U. "Unit" means a personal dwelling space, even one lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use area, such as 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, junior accessory dwelling unit, or second unit.

10.90.20 Smoking Prohibited.

A. Smoking is prohibited in the following Enclosed Areas:

1. ~~In Recreational Areas~~ Places of Employment; and
2. ~~In Outdoor Dining Areas~~ Public Places; and
3. ~~At entrances, exits, operable windows, or air intake openings of any building area which is available or customarily used by the general public and which is designed, established, or regularly used for selling or consuming food or drink.~~

B. Smoking is prohibited by this chapter in all Enclosed Areas exempted by the California workplace law (Labor Code section 6404.5(d), as that section may be amended from time to time) except as provided below.

1. Smoking at theatrical production sites is not prohibited by this subsection if the theater general manager certifies that smoking is an essential part of the story and the use of a fake, prop, or special effect cannot reasonably convey the idea of smoking in an effective way to a reasonable member of the anticipated audience. This exception will not apply if minors are performers within the production;
2. Smoking is not restricted by this subsection in up to twenty percent (20%) of guest room accommodations in a hotel, motel, or similar transient lodging establishment.

C. Smoking is prohibited in the following Unenclosed Areas:

1. **Places of Employment;**
2. ~~In~~ **Recreational Areas;**
3. ~~In~~ **Outdoor Dining Areas;**
4. **Service Areas; and**
5. **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.**

D. ~~B.~~ Reasonable Smoking Distance Required.

1. **Smoking in all Unenclosed Areas shall be prohibited within a Reasonable Distance in any direction from any operable doorway, window, opening, crack, or vent into an Enclosed Area in which smoking is prohibited under Section 10.90.020A, except while actively passing on the way to another destination and provided Smoke does not enter any area in which Smoking is prohibited.**
2. ~~1.~~ Smoking in all ~~u~~Unenclosed aAreas is prohibited within a ~~r~~Reasonable Distance from any ~~u~~Unenclosed aAreas in which ~~s~~Smoking is prohibited under Section 10.90.020A, except while actively passing on the way to another destination and provided Smoke does not enter any area in which ~~s~~Smoking is prohibited.
3. ~~2.~~ The ~~s~~Smoking prohibitions in Section 10.90.020B.1 shall not apply to ~~u~~Unenclosed aAreas of private residential properties **that are not Multi-unit Residences.**

E. ~~C.~~ 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.

F. ~~D.~~ No Person shall dispose of used Smoking waste within the boundaries of an area in which Smoking is prohibited by this chapter.

G. ~~E.~~ 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.

(Ord. 14-2121, § 3, 2014; Ord. 11-2077 (part), 2011)

10.90.30 ~~Other Requirements and Prohibitions~~ Multi-unit Housing

- A. Beginning October 1, 2021, smoking is prohibited and 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. Be a Reasonable Distance in any direction from a Nonsmoking Area and/or any operable doorway, window, opening or other vent into an enclosed area of adjacent private property;
 - 5. Have a clearly marked perimeter;
 - 6. Have a receptacle for cigarette butts that is emptied and maintained;
and
 - 7. 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 10.90.050 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 October 1, 2021 shall include the following:
1. A clause providing that it is a material breach of the agreement to Smoke or allow Smoking:
 - a. in the Unit, including exclusive-use areas such as balconies, porches, or patios; and
 - b. 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.

10.90.040 ~~Posting of Signs~~ Other Requirements and Prohibitions.

A. No ash can, ashtray, or other Smoking waste receptacle shall be placed in any area in which Smoking is prohibited by this chapter.

B. No Person shall dispose of used Smoking waste within the boundaries of an area in which Smoking is prohibited by this chapter.

C. Persons owning or occupying property are responsible for maintaining the premises, including the perimeter and the sidewalk in front of their premises, free of loose litter, in accordance with Section 9.18.215.

CD. The presence of Smoking waste receptacles in violation of subsection A. above or the absence of signs shall not be a defense to a violation of any provision of this chapter.

DE. 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. (Ord. 11-2077 (part), 2011)

10.90.050 Posting of Signs.

Where sSmoking is prohibited by this chapter, a clear conspicuous sign shall be posted at a conspicuous point within the area. The sign shall have letters of no less than one inch in height and shall include, either 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) or “No Smoking” in words. **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 sSmoking in violation of any other provision of this chapter.

(Ord. 14-2121, § 4, 2014)

10.90.060 Violation - Penalty.

A. The remedies provided by this article are cumulative and in addition to any other remedies available at law or in equity. Except as otherwise provided, enforcement of this chapter is at the sole discretion of the City of Cupertino. Nothing in this chapter shall create a right of action in any person against the City of Cupertino or its agents to compel public enforcement of this article against any party.

B. Any person who violates any of the provisions of this chapter shall be guilty of an infraction and upon conviction thereof shall be punished as provided in Chapter 1.12 or, in the alternative, subject to enforcement action pursuant to Chapter 1.10: Administrative Citations, Fines, and Penalties.

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 city attorney, 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 10.90.050 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 10.90.030(G) 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.

G. An owner, operator, or manager ("owner") of a commercial establishment shall not be responsible for violations of this chapter within an area under 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.

10.90.070 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.