

**CITY OF WALNUT CREEK
ORDINANCE NO.**

**AN ORDINANCE OF THE CITY OF WALNUT CREEK AMENDING CHAPTER 4 OF TITLE 5
OF THE MUNICIPAL CODE TO REGULATE SMOKING**

The City Council of the City of Walnut Creek does ordain as follows:

Section 1. Findings.

The City Council of the City of Walnut Creek hereby finds and declares as follows:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health challenge, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States,¹ accounting for about 443,000 deaths each year;² and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;³ and
- Some of the most common types of cancers including stomach, liver, uterine, cervix, and kidney are related to tobacco use;⁴ 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;⁵ 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

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: The Nation's Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: Targeting the Nation's Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: The Nation's Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

⁴ Leistikow B, Zubair K, Connolly GN, et al. "Male Tobacco Smoke Load and Non-Lung Cancer Mortality Associations in Massachusetts." *BMC Cancer*, 8:341, 2008. Available at: www.biomedcentral.com/1471-2407/8/341.

⁵ US Department of Health and Human Services, Office of the Surgeon General. *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General*. 2010, p. 9. Report highlights available at: www.surgeongeneral.gov/library/tobaccosmoke/factsheet.html.

for which there is no safe level of exposure;⁶ 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;⁷ and

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

- Secondhand smoke is responsible for as many as 3,000 deaths from lung cancer and 46,000 deaths from heart disease among nonsmokers each year in the United States;⁸ and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;⁹ and
- Secondhand smoke exposure 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;¹⁰ and exacerbates childhood asthma;¹¹ and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion;¹² and
- From 2001–2004, the average annual health care expenditures attributable to smoking were approximately \$96 billion;¹³ and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were

⁶ Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; see also California Environmental Protection Agency, Air Resources Board. *News Release, California Identifies Secondhand Smoke as a “Toxic Air Contaminant.”* Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. 2006, p. 8 & 17. Available at: www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf.

⁸ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: Targeting the Nation’s Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

⁹ Barnoya J and Glantz S. “Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking.” *Circulation*, 111: 2684-2698, 2005. Available at: www.circ.ahajournals.org/cgi/content/full/111/20/2684.

¹⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: Targeting the Nation’s Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

¹¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: Targeting the Nation’s Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

¹² US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Economic Facts about U.S. Tobacco Production and Use*, www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm#costs (last updated March 9, 2011).

¹³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Economic Facts about U.S. Tobacco Production and Use*, www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm#costs (last updated March 9, 2011).

estimated at over \$10 billion per year in the United States in 2005;¹⁴ and

- California's Tobacco Control Program saved the state and its residents \$86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly;¹⁵ and

WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, as evidenced by the following:

- Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers;¹⁶ and
- Irritation from secondhand smoke begins at levels as low as 4 micrograms per cubic meter, and in some outdoor situations this level can be found as far away as 13 feet from the burning cigarette;¹⁷ and
- Smoking cigarettes near building entryways can increase air pollution levels by more than two times as compared to background levels, with maximum levels reaching the "hazardous" range on the US EPA's Air Quality Index.¹⁸
- To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 25 feet away from the source of the smoke, about the width of a two-lane road;¹⁹ and
- Studies on a cruise ship have found that even while cruising at 20 knots and with unlimited air volume, outdoor smoking areas contained carcinogens in nearly the same amounts as inside the

¹⁴ Behan DF, Eriksen MP and Lin, Y. *Economic Effects of Environmental Tobacco Smoke*. Schaumburg, IL: Society of Actuaries, 2005, p. 2. Available at: [www.soa.org/files/pdf/ETSReportFinalDraft\(Final%203\).pdf](http://www.soa.org/files/pdf/ETSReportFinalDraft(Final%203).pdf); see also US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Fast Facts*, www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm (last updated March 9, 2011).

¹⁵ Lightwood JM, Dinno A and Glantz SA. "Effect of the California Tobacco Control Program on Personal Health Care Expenditures." *PLoS Med*, 5(8): e178, 2008. Available at: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050178.

¹⁶ Klepeis NE, Ott WR, and Switzer P. *Real-Time Monitoring of Outdoor Environmental Tobacco Smoke Concentrations: A Pilot Study*. San Francisco: University of California, San Francisco and Stanford University, 2004, p. 80, 87. Available at: http://exposurescience.org/pub/reports/Outdoor_ETS_Final.pdf; see also Klepeis NE, Ott WR and Switzer P. "Real-Time Measurement of Outdoor Tobacco Smoke Particles." *Journal of the Air & Waste Management Association*, 57: 522-534, 2007. Available at: www.ashaust.org.au/pdfs/OutdoorSHS0705.pdf.

¹⁷ Junker MH, Danuser B, Monn C, et al. "Acute Sensory Responses of Nonsmokers at Very Low Environmental Tobacco Smoke Concentrations in Controlled Laboratory Settings." *Environmental Health Perspectives*, 109(10): 1045-1052, p. 1049-51, 2001. Available at: www.pubmedcentral.nih.gov/picrender.fcgi?artid=1242082&blobtype=pdf; Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, p. 1626, 2008. Available at: www.repace.com/pdf/Repace_Ch_15_Outdoor_Smoke.pdf.

¹⁸ Kaufman P, Zhang, B, Bondy S, et al. "Not just 'a few wisps': real-time measurement of tobacco smoke at entrances to office buildings." *Tobacco Control*. Published Online First: 21 December 2010. doi:10.1136/tc.2010.041277. Abstract available at: <http://tobaccocontrol.bmj.com/content/early/2010/12/21/tc.2010.041277.abstract>

¹⁹ Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, p. 1626, 2008. Available at: www.repace.com/pdf/Repace_Ch_15_Outdoor_Smoke.pdf.

ship's casino where smoking was allowed;²⁰ and

WHEREAS, cigarette butts pose a health threat to young children, as evidenced by the following:

- In 2009, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarettes, cigarette butts, and other tobacco products;²¹ and
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;²² and

WHEREAS, cigarette butts are a major and persistent source of litter, as evidenced by the following:

- It is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year;²³ and
- Cigarette butts are often cast onto sidewalks and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean;²⁴ and
- Cigarette filters, made of plastic cellulose acetate, take approximately 15 years to decompose;²⁵ and

WHEREAS, laws restricting the use of tobacco products have recognizable benefits to public health and medical costs, as evidenced by the following:

- Cities with smokefree laws see an appreciable reduction in hospital admittances for heart attacks in the months and years after such laws are passed;²⁶ and
- Smoking bans help people reduce the number of cigarettes they smoke or quit altogether;²⁷ and
- Strong smoking regulations for restaurants decrease the number of children who transition

²⁰ Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, p. 1626, 2008. Available at: www.repace.com/pdf/Repace_Ch_15_Outdoor_Smoke.pdf.

²¹ Bronstein AC, Spyker DA, Cantilena LR, et al. American Association of Poison Control Centers. "2009 Annual Report of the American Association of Poison Control Centers' Centers' National Poison Data System (NPDS): 27th Annual Report" *Clinical Toxicology*, 48(10): 979-1178, p. 1124, 2010. Available at: www.aapcc.org/dnn/Portals/0/correctedannualreport.pdf.

²² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Ingestion of Cigarettes and Cigarette Butts by Children – Rhode Island, January 1994 -July 1996." *Morbidity and Mortality Weekly Report*, 46(06): 125-128, 1997. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/00046181.htm.

²³ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php. (last visited March 10, 2011).

²⁴ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php. (last visited March 10, 2011).

²⁵ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php. (last visited March 10, 2011).

²⁶ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Reduced Hospitalizations for Acute Myocardial Infarction After Implementation of a Smoke-Free Ordinance – City of Pueblo, Colorado, 2002 – 2006." *Morbidity and Mortality Weekly Report*, 57(51&52): 1373-1377, 2009. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5751a1.htm; Glantz SA. "Meta-Analysis of the Effects of Smokefree Laws on Acute Myocardial Infarction: An Update." *Preventive Medicine*, 47(4): 452-453, 2008. Abstract available at: www.ncbi.nlm.nih.gov/pmc/articles/PMC2927851/?tool=pubmed.

²⁷ Neighmond P. "Smoking Bans Help People Quit, Research Shows." *National Public Radio*, October 25, 2007, www.npr.org/templates/story/story.php?storyId=15610995.

from experimenting with smoking to becoming actual smokers;²⁸ and

WHEREAS, the U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could be exposed;²⁹ and

WHEREAS, creating smokefree areas helps protect the health of the 86.9% of Californians who are nonsmokers;³⁰ and

WHEREAS, society is becoming less tolerant and less accepting of cigarette smoking, as evidenced by the following,

- A 2008 survey of California voters found that 97% thought that secondhand smoke is harmful, 88% thought secondhand smoke was harmful even outdoors, 65% were bothered by secondhand smoke, and 73% support laws restricting smoking in outdoor public places;³¹ and
- People living in cities with strong smokefree air laws are more likely to believe smoking is not acceptable and that smokers should attempt to quit smoking;³² and
- As of 2010, there are at least 273 California cities and counties with local laws restricting smoking in recreational areas, 85 with smokefree outdoor dining laws, and 23 that restrict smoking on sidewalks in commercial areas;³³ and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions;³⁴ and state law prohibits smoking within 20 feet of entryways and operable windows of government buildings;³⁵ and

WHEREAS, there is no Constitutional right to smoke;³⁶

²⁸ Siegel M, Albers AB, Cheng DM, et al. "Local Restaurant Smoking Regulations and the Adolescent Smoking Initiation Process: Results of a Multilevel Contextual Analysis Among Massachusetts Youth." *Archives of Pediatrics and Adolescent Medicine*, 162(5): 477-483, 2008. Available at: <http://archpedi.ama-assn.org/cgi/reprint/162/5/477.pdf>.

²⁹ US Food and Drug Administration. *News Release, FDA and Public Health Experts Warn About Electronic Cigarettes*. July 22, 2009. Available at: www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm.

³⁰ California Department of Public Health, *News Release, State's Latest Tobacco Ads Debut*. December 20, 2010. Available at: www.cdph.ca.gov/Pages/NR10-099.aspx.

³¹ Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure*. Sacramento: Center for Tobacco Policy & Organizing, 2008, p. 1-3. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf.

³² Indiana University. *News Release, Indiana University Research at American Public Health Association Meeting*. October 27, 2008. Available at: <http://newsinfo.iu.edu/tips/page/normal/9085.html#3>.

³³ American Lung Association in California *State of Tobacco Control 2010 – California Local Grades*, 2010, p. 9. Available at: www.lungusa.org/associations/states/california/assets/pdfs/sotc-2010/sotc2010_full-report.pdf.

³⁴ Cal. Health & Safety Code § 104495 (West 2008).

³⁵ Cal. Gov't Code § 7597 (West 2008).

³⁶ ChangeLab Solutions. *There Is No Constitutional Right to Smoke*. 2005. Available at www.changelabsolutions.org/publications/no-constitutional-right-smoke.

WHEREAS, California cities and counties have the legal authority to adopt local laws that make all indoor places of employment nonsmoking;³⁷ and

NOW THEREFORE, it is the intent of the City Council, in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around non-tobacco users, especially children; by protecting the public from exposure to secondhand smoke where they live, work, and play; by reducing the potential for children to wrongly associate smoking with a healthy lifestyle; and by affirming and promoting a healthy environment in the City.

Section 2. Sections 5-4.101 through and inclusive of 5-4.104 of Chapter 4 of Title 5 of the Walnut Creek Municipal Code are hereby repealed in their entirety.

Section 3. A new Article I of Chapter 4 of Title 5 of the Municipal Code is hereby adopted as follows:

Article I (Smoking Prohibitions)

Sec. 5-4.101. DEFINITIONS. For the purposes of this Chapter only, the following words and phrases shall have the meanings defined in this section unless the context clearly requires otherwise:

- (a) “Business” means any sole proprietorship, partnership, joint venture, corporation, association, or other entity formed for profit-making purposes.
- (b) “Common Area” means every Enclosed Area or Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit of that Multi-Unit Residence are entitled to enter or use, including, for example, halls and paths, lobbies and courtyards, elevators and stairs, community rooms and playgrounds, gym facilities and swimming pools, parking garages and parking lots, shared restrooms, shared laundry rooms, shared cooking areas, and shared eating areas.
- (c) “Dining Area” means any 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) “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.
- (e) “Employer” means any Business or Nonprofit Entity that retains the service of one or more Employees.
- (f) “Enclosed Area” means an area in which outside air cannot circulate freely to all parts of the

³⁷ Cal. Lab. Code § 6404.5(i) (West 2009).

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 vertical constraint to airflow including, but not limited to, vegetation of any height whether or not those boundaries include vents or other openings; or
 - (2) four (4) walls or other vertical constraints to airflow including, but not limited to, vegetation that exceed six (6) feet in height whether or not those boundaries include vents or other openings.
- (g) “Multi-Unit Residence” means property containing two (2) or more Units, except the following specifically excluded types of housing:
- (1) a hotel or motel that meets the requirements of California Civil Code section 1940(b)(2);
 - (2) a single-family home;
 - (3) a single-family home with a detached or attached in-law or second unit; and
- (h) “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.
- (i) “Pedestrian Retail District” means the area bounded by the centerline of California Boulevard on the west, the centerline of North and South Broadway on the east, the centerline of Newell Avenue on the south, and the centerline of Civic Drive on the north and the area bounded by the centerline of Giammona Drive on the north, the centerline of Civic Drive on the on the South, the centerline of N. Locust Street on the west, and the centerline of North Main Street on the east.
- (j) “Person” means any natural person, Business, cooperative association, Nonprofit Entity, personal representative, receiver, trustee, assignee, or any other legal entity including a government agency.
- (k) “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. “Place of Employment” does not include private smokers’ lounges that meet the requirements of subdivision (d)(4)(A) of Labor Code section 6404.5 or its successor.

- (l) “Public Place” means any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement. “Public Place” does not include private smokers’ lounges that meet the requirements of subdivision (d)(4)(A) of Labor Code section 6404.5 or its successor.
- (m) “Reasonable Distance” means a distance of twenty-five (25) feet in any direction from an area in which Smoking is prohibited.
- (n) “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, picnic areas, playgrounds, sports fields, open space, walking paths, gardens, hiking trails, bike paths, riding trails, swimming pools, ice-skating rinks, and skateboard parks, but does not include unenclosed areas of private and public golf courses.
- (o) “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.
- (p) “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 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 and gases, particles, and vapors from electronic cigarettes.
- (q) “Smoking” means engaging in an act that generates Smoke, such as, for example: possessing a lighted pipe, a lighted hookah pipe, an operating electronic cigarette, a lighted cigar, or a lighted cigarette of any kind; or lighting or igniting a pipe, a hookah pipe, a cigar, or a cigarette.
- (r) “Unenclosed Area” means any area that is not an Enclosed Area.
- (s) “Unit” means 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 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 home; and an in-law or second unit.

Sec. 5-4.102. PROHIBITION OF SMOKING IN ENCLOSED PLACES

(a) In addition to prohibitions under State or Federal law, smoking is prohibited in the Enclosed Areas of the following places within the City:

- (1) Places of Employment;
- (2) Public Places;
- (3) Common Areas of all Multi-Unit Residences; and
- (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, except as provided below.

- (1) Smoking at theatrical production sites is not prohibited by this subsection if 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) Notwithstanding anything to the contrary in the foregoing, this Chapter does not prohibit smoking in retail tobacco establishments with private smokers' lounges meeting the requirements of the applicable portions of subdivision (d)(4) of the Labor Code.

(c) The prohibitions set out in subsections (a)(3) and (a)(4) above shall not be operative until sixty (60) days following the effective date of this chapter.

Sec. 5-4.103. 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 Walnut Creek::

- (1) Throughout the Pedestrian Retail District;
- (2) Recreational Areas;
- (3) Service Areas;
- (4) Dining Areas;

- (5) Within twenty-five (25) feet of any Enclosed Area where Smoking is Prohibited by this Chapter;
- (6) Places of Employment; and
- (7) Common Areas of all Multi-Unit Residences, provided, however, that a Person with legal control over a Common Area may designate a portion of the Unenclosed Area of the Common Area as a designated Smoking area if the area meets all of the following criteria:
 - (a) the area must be located a Reasonable Distance from any Unit or Enclosed Area where Smoking is prohibited by this chapter or other law; by binding agreement relating to the ownership, occupancy, or use of real property; or by designation of a Person with legal control over the property. In the case of a nonsmoking area created by agreement or designation, this provision does not apply unless the Person designating the Smoking area has actual knowledge of, or has been given notice of, the agreement or designation. A Person with legal control over a designated Smoking area may be obliged to modify, relocate or eliminate that as laws change, as binding agreements are created, and as nonsmoking areas on neighboring property are established.
 - (b) the area must not include, and must 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, school campuses, and sandboxes;
 - (c) the area must be no more than ten percent (10%) of the total Unenclosed Area of the Multi-Unit Residence for which it is designated;
 - (d) the area must have a clearly marked perimeter;
 - (e) the area must be identified by conspicuous signs;
 - (f) the area must be completely within an Unenclosed Area; and
 - (g) the area must not overlap with any Enclosed or Unenclosed Area in which Smoking is otherwise prohibited by this chapter or other provisions of this Code, state law, or federal law
- (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 prohibitions set out in subsections (a)(1) and (a)(2) above shall not be operative until the City Manager has certified in writing to the City Clerk that the City has complied with the sign posting requirements of subsection (c) of Section 5-4.104 for each specified place or 30 days

following the effective date of this section, whichever is later. This certification may be made separately for the Pedestrian Retail District and for each Recreational Area.

- (c) The prohibition set out in subsection (a)(7) above shall not be operative until ninety (90) days following the effective date of this chapter.

Sec. 5-4.104. OTHER REQUIREMENTS AND PROHIBITIONS

- (a) No Person, Employer, or Nonprofit Entity shall knowingly permit Smoking 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.
- (b) The presence of ash receptacles in violation of this subsection shall not be a defense to a charge of Smoking in violation of any provision of this chapter.
- (c) A Person, Employer, or Nonprofit Entity that has legal or de facto control of an Unenclosed 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), as well as cite to this Title and Chapter for reference. For purposes of this section, the City Manager or his or her designee shall be responsible for the posting of signs in places owned or controlled by the City. Notwithstanding this provision, the presence or absence of signs shall not be a defense to a charge of Smoking in violation of any other provision of this chapter.
- (c) 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: (i) within 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 subsections 5-4.102(a)(3), 5-4.102(a)(4) and 5-4.103(a)(7) and (ii) post signage, prior to the operative date of subsections 5-4.102(a)(3), 5-4.102(a)(4) and 5-4.103(a)(7), meeting the requirements of subsection (c) of this section at each point of ingress into the Multi-Unit Residence and at least one other conspicuous point in the Common Area. In addition to those requirements, the signage shall indicate that smoking is prohibited within Units in the Multi-Unit Residence and within the Common Area, except as designated under subsection 5-4.103(a)(7). Notwithstanding this provision, the presence or absence of signs shall not be a defense to a charge of Smoking in violation of any other provision of this chapter.
- (d) 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.

- (e) 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.
- (f) Every lease or other agreement for the occupancy of a Unit in a Multi-Unit Residence entered into, amended, or renewed ninety (90) or more days following the effective date of this section shall include:
 - i. A clause stating that smoking is prohibited in the unit;
 - ii. A clause stating that it is a material breach of the lease or agreement to (A) violate any law regulating smoking while on the premises; (B) smoke in the unit; or (C) smoke in any Multi-Unit Residence Common Area in which smoking is prohibited; and
 - iii. A clause stating that all occupants of the Multi-Unit Residence are express third-party beneficiaries of the above required clauses.
 - iv. 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) The lease or agreement terms required by subsection (f) above are hereby incorporated by law into any lease or other agreement for the occupancy of a unit in a Multi-Unit Residence made on or after the effective date of this section and which does not fully comply with subsections (f)(i), (f)(ii) or (f)(iii).
 - i. 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. A landlord shall not be liable to any person for a tenant's breach of smoking regulations if the landlord has fully complied with the requirements of this Chapter.
 - ii. Failure to enforce any smoking regulation of a lease or agreement on one or more occasions shall not constitute a waiver of the lease or agreement provisions required by this Chapter and shall not prevent future enforcement of any such smoking regulation on another occasion.

Sec. 5-4.105. PENALTIES AND ENFORCEMENT.

- (a) The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.
- (b) Each incident of Smoking in violation of this chapter is an infraction subject to a one hundred dollar (\$100) fine or otherwise punishable pursuant to section 1-2.01 of the Municipal Code. Other violations of this chapter may, in the discretion of the City Attorney, be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this chapter shall be the responsibility of the City Manager or his or her designee. In addition, any peace officer or code enforcement official also may enforce this chapter.

- (c) Violations of this chapter are subject to a civil action brought by the City, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.
- (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 violation of this chapter is hereby declared to be a nuisance.
- (f) In addition to other remedies provided by this chapter or by other law, any violation of this chapter may be remedied by a civil action brought by the City Attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.
- (g) Any Person acting for the interests of itself, its members, or the general public (hereinafter “Private Enforcer”) 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. If there is insufficient or no proof of actual damages for a specific violation, the court shall award one hundred fifty dollars (\$150) for each violation as statutory damages.
 - (1) Notwithstanding any other provision of this chapter, a Private Enforcer may bring a civil action to enforce this chapter only if the following requirements are met:
 - (A) The Private Enforcer’s civil action is begun more than sixty (60) days after the Private Enforcer has given written notice of the alleged violations of this chapter to the City Attorney and to the alleged violator.
 - (B) On the date the Private Enforcer’s civil action is filed, no other Person acting on behalf of the City has commenced or is prosecuting an administrative, civil, or criminal action based upon, in whole or in part, any violation which was the subject of the Private Enforcer’s notice.
 - (C) A Private Enforcer shall provide a copy of his, her, or its action to the City Attorney within seven (7) days of filing it.
 - (2) Upon a settlement or judgment based upon, in whole or in part, any violation which was the subject of the Private Enforcer’s notice, the Private Enforcer shall give the City Attorney notice of the settlement or judgment and final disposition of the case within thirty (30) days of the date of the settlement or judgment. No settlement by a Private Enforcer of a violation of this chapter shall be valid or enforceable if, within thirty (30) days of receiving notice of the settlement, the City Attorney determines the settlement to

be unreasonable in light of the purposes of this chapter. Any settlement or judgment that does not meet the requirements of this subsection may be set aside upon motion to a court of competent jurisdiction by the City Attorney.

- (i) Except as otherwise provided, enforcement of this chapter is at the sole discretion of the City. Nothing in this chapter shall create a right of action in any Person against the City or its agents to compel public enforcement of this chapter against private parties.

SECTION IV. STATUTORY CONSTRUCTION & SEVERABILITY. It is the intent of the City Council of the City of Walnut Creek to supplement applicable state and federal law and not to duplicate or contradict such law and this ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this ordinance, or its application to any other person or circumstance. The City Council of the City of Walnut Creek hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof independently, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable. 2145628.1