

ORDINANCE NO. 23-09 N.S.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF RICHMOND ADDING CHAPTER 9.57 TO THE CITY OF RICHMOND MUNICIPAL CODE PROHIBITING SMOKING IN AND AROUND MULTI-UNIT RESIDENCES

Now, therefore, the City Council of the City of Richmond does ordain as follows:

SECTION 1. FINDINGS.

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

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

- more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;¹ and
- the World Health Organization estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide;² and
- the United States Environmental Protection Agency has found secondhand smoke to be a risk to public health and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen;³ and
- secondhand smoke is responsible for an estimated 38,000 deaths among non-smokers each year in the United States, which includes 3,000 lung cancer deaths and 35,000 deaths due to heart disease;⁴ and
- 87.9% of non-smokers showed detectable levels of cotinine (a metabolite of nicotine) in their blood, the most likely source of which is secondhand smoke exposure;⁵ and
- secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight and increased risk of Sudden Infant Death Syndrome in infants of mothers who smoke;⁶ and
- secondhand smoke exposure causes as many as 300,000 children in the United States under the age of 18 months to suffer lower respiratory tract infections, such as pneumonia and bronchitis;⁷ exacerbates childhood asthma; and increases the risk of acute, chronic, middle-ear infections in children;⁸ and

¹ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999 MORBIDITY AND MORTALITY WEEKLY REPORT* at 51(14):300-303 (2002), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf>. (last accessed March 23, 2005).

² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Reducing Tobacco Use: A Report of the Surgeon General* at 437 (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/chapter8.pdf (last accessed March 23, 2005).

³ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Exposure to Environmental Tobacco Smoke and Cotinine Levels — Fact Sheet* (2004), available at http://www.cdc.gov/tobacco/research_data/environmental/factsheet_ets.htm (last accessed March 23, 2005).

⁴ Nat'l Cancer Inst., *NCI Health Information Tip Sheet for Writers: Secondhand smoke*, available at <http://www.cancer.gov/newscenter/tip-sheet-secondhand-smoke> (last accessed February 28, 2005).

⁵ J. L. Pirkle et al., *Exposure of the U.S. population to environmental tobacco smoke: The Third National Health and Nutrition Examination Survey, 1988 to 1991*, *JOURNAL OF AMERICAN MEDICINE*, 275(16):1233-40 (1996), available at <http://jama.ama-assn.org/cgi/content/abstract/275/16/1233> (abstract only) (last accessed March 23, 2005).

⁶ Office of Env'tl. Health Hazard Assessment, Cal. Env'tl. Prot. Agency, *Health Effects of Exposure to Environmental Tobacco Smoke, Final Report* at 4-30 (1997), available at <http://www.oehha.org/pdf/chapter4.pdf> (last accessed February 28, 2005).

⁷ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002* at 2 (2004), available at http://www.cdc.gov/nccdphp/aag/aag_osh.htm (last accessed April 6, 2005).

⁸ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Exposure to Environmental Tobacco Smoke and Cotinine Levels — Fact Sheet* (2004), available at http://www.cdc.gov/tobacco/research_data/environmental/factsheet_ets.htm (last accessed April 6, 2005).

- the total cost of smoking in California was estimated as \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;⁹ and
- cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States,¹⁰ causing an estimated 31,200 structure fires and 830 deaths in 2001;¹¹ and

WHEREAS, most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- 84% of Californians are non-smokers;¹² and
- 70% of Californians surveyed approve of apartment complexes requiring at least half of rental units be non-smoking;¹³ and
- 67% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings;¹⁴ and

WHEREAS, secondhand smoke can seep under doorways and through wall cracks;¹⁵ and

WHEREAS, there is no Constitutional right to smoke;¹⁶ and

WHEREAS, state law prohibits smoking in virtually all indoor places of employment reflecting the state policy to protect against the dangers of exposure to secondhand smoke;¹⁷ and

WHEREAS, a local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is not prohibited by state law;¹⁸ 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; by protecting children from exposure to smoking where they live and play; and by protecting the public from nonconsensual exposure to secondhand smoke in and around their homes.

⁹ Wendy Max, Dorothy P. Rice, Xiulan Zhang, Hai-Yen Sung, Leonard Miller, Cal. Dept. of Health Servs., *The Cost of Smoking in California, 1999* at 76 (2002), available at <http://www.dhs.ca.gov/tobacco/documents/CostOfSmoking1999.pdf> (last accessed March 4, 2005).

¹⁰ Bruce N. Leistikow, M.D., M.S., Daniel C. Martin, Christina E. Milano, *Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview* 91 PREVENTIVE MEDICINE 31 at 91 (2000), available at <http://leistikow.ucdavis.edu/SmokingFires.pdf> (last accessed April 6, 2005).

¹¹ Nat'l Fire Prot. Ass'n, *The Smoking-Material Fire Problem*, available at <http://www.nfpa.org/itemDetail.asp?categoryID=294&itemID=19303&URL=Research%20&%20Reports/Fact%20sheets/Home%20safety/Smoking%20material-related%20fires> (last accessed March 4, 2005). See also John R. Hall, Jr., Nat'l Fire Prot. Ass'n, *The Smoking-Material Fire Problem*, (Nov. 2004), available at <http://www.nfpa.org/assets/files/PDF/OS.smokesum2.PDF> (executive summary only) (last accessed March 4, 2005).

¹² Tobacco Control Section, Cal. Dep't of Health Servs., *California Tobacco Control Update 2004* at 10, available at <http://www.dhs.ca.gov/tobacco/documents/2004TCSupdate.pdf> (last accessed April 7, 2005).

¹³ Tobacco Control Section, Cal. Dep't of Health Servs., *2004 Field Research Poll Results* at 16 (2004), available at <http://www.dhs.ca.gov/tobacco/documents/2004TCSupdate.pdf> (last accessed March 4, 2005).

¹⁴ Ctr. For Tobacco Policy and Org., Am. Lung Ass'n of Cal., *Statewide Tobacco Renter Study* (2004), available at http://www.californialung.org/thecenter/community/documents/SFH-Survey-Data_001.doc (last accessed March 4, 2005).

¹⁵ J. Wagner et al., *Environmental Tobacco Smoke Leakage from Smoking Rooms*, JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL HYGIENE, 1:110-118 (2004), available at <http://eetd.lbl.gov/IEP/pdf/LBNL-51010.pdf> (last accessed April 7, 2005).

¹⁶ Technical Assistance Legal Ctr., Pub. Health Inst., *There Is No Constitutional Right to Smoke* (2004), available at http://talc.phlaw.org/pdf_files/0051.pdf (last accessed April 8, 2005).

¹⁷ Cal. Lab. Code § 6404.5 (Deerings 2005).

¹⁸ Cal. Legislative Counsel Op., 21547, *Secondhand Smoke in Multi-Unit Housing (Apartments & Condos) Smoking Bans: Residential Rental Property*, (September 23, 1999).

SECTION 2

Chapter 9.57 entitled “**PROHIBITION OF SMOKING IN AND AROUND MULTI-UNIT RESIDENCES**” of the City of Richmond Municipal Code is hereby added to read as follows:

CHAPTER 9.57

Sections:

- 9.57.010** **Definitions.**
- 9.57.020** **No Smoking Common Areas, Designated Smoking Area.**
- 9.57.030** **Non-Smoking Units Required in Multi-Unit Residences.**
- 9.57.040** **Disclosure of Designated Smoking Areas.**
- 9.57.050** **Prohibitions and Duties Generally.**
- 9.57.060** **Medical Marijuana.**
- 9.57.070** **Enforcement.**
- 9.57.080** **Private Enforcement.**

9.57.010 **Definitions.**

For the purposes of this Chapter, the following definitions shall govern unless the context clearly requires otherwise:

(a) “Landlord” means any Person who owns property let for residential use, who lets residential property, or any Person who manages such property, except that “Landlord” does not include sublessors.

(b) “Multi-Unit Residence” means a Premises that contains two (2) or more Units.

(c) “Multi-Unit Residence Common Area” means any enclosed or unenclosed area of a Multi-Unit Residence accessible to and usable by more than one residence, including but not limited to halls and pathways, lobbies, laundry rooms, common eating and cooking areas, play areas, swimming pools, and parking areas.

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

(e) “Premises” means a piece of land and any improvements upon it such as is usually described in a deed, deed of trust or mortgage, and includes legally separate but contiguous pieces of land that are owned by the same natural Person or by legal Persons under common control.

(f) “Private Enforcer” means any Person, including a legal entity or organization, acting on behalf of its own interests, its members, or the general public, who may bring a civil action to enforce this Chapter.

(g) “Reasonable Distance” means a distance of at least twenty-five (25) feet in any direction from an area in which smoking is prohibited. This distance should be reasonably sufficient to ensure that occupants of an area in which smoking is prohibited are not exposed to secondhand smoke created by smokers outside the areas.

(h) “Smoking” or to “Smoke” means possessing a lighted pipe, lighted cigar, or lighted cigarette of any kind, including, but not limited to, tobacco, or any other weed or plant, or the lighting of a pipe, cigar, or cigarette of any kind, including, but not limited to, tobacco, or any other weed or plant.

(i) “Unit” means: (1) a dwelling space consisting of essentially complete independent living facilities for one or more individuals, including, for example, permanent provisions for living and sleeping, and any private outdoor spaces like balconies and patios; and (2) senior citizen housing and single room occupancy hotels, as defined in California Health and Safety Code

section 50519(b)(1), even where lacking private cooking facilities or private plumbing facilities. “Unit” does not include lodging in a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2).

7.57.020 No Smoking Common Areas, Designated Smoking Area.

(a) Smoking is prohibited in all Multi-Unit Residence Common Areas except that a Person with legal control over a Multi-Unit Residence Common Area, such as, for example, a Landlord or homeowners’ association, may designate a portion of the outdoor area of the Premises as a Smoking area as provided in paragraph (b) below.

(b) A designated Smoking area:

(1) must be located a Reasonable Distance from any indoor area where Smoking is prohibited by this Chapter or other law unless 25-feet is not feasible;

(2) must not include, and must be a Reasonable Distance from, outdoor areas primarily used by children including, but not limited to, areas improved or designated for play or swimming;

(3) must be no more than twenty-five percent (25%) of the total outdoor area of the Premises for which it is designated;

(4) must have a clearly marked perimeter;

(5) must be identified by conspicuous signs; and

(6) must not overlap with any area in which Smoking is otherwise prohibited by this Chapter or other provisions of this Code, state law, or federal law.

7.57.030 Non-Smoking Units Required in Multi-Unit Residences.

(a) In every Multi-Unit Residence, Landlords shall, by July 1, 2010, notify each Unit of its implementation schedule and plan for complying with this Chapter. Each Landlord shall also notify each new Tenant after July 1, 2010 of the lease terms required by this Chapter.

(b) New Multi-Unit Residences.

In every new Multi-Unit Residence that receives a certificate of occupancy after the effective date of this Chapter, one hundred percent (100%) of the Units (including private outdoor spaces associated with such Units, such as balconies, patios and decks), shall be non-smoking Units by law.

(1) Required Lease Terms: Every lease or other agreement for the occupancy of a Unit in a new Multi-Unit Residence shall include:

a. A clause stating that Smoking is prohibited in the Unit;

b. A clause stating that it is a material breach of the lease or agreement to (i) violate any law regulating Smoking while on the Premises; (ii) Smoke in the Unit; or (iii) Smoke in any Multi-Unit Residence Common Area in which Smoking is prohibited; and

c. A clause stating that all occupants of the Multi-Unit Residence are express third-party beneficiaries of the above required clauses.

(2) The California Apartment Association’s Form 34.0, revised 1/07, meets the requirements for lease terms as outlined and is an option for use to comply with this section.

(c) Existing Multi-Unit Residences.

In every Multi-Unit Residence existing on the effective date of this Chapter, not subject to subsection (a) above, one hundred percent (100%) of the Units (including private outdoor spaces associated with such Units, such as balconies, patios, and decks), shall by law be non-smoking Units by January 1, 2011. A Person with legal control over a Multi-Unit Residence, such as, for example, a Landlord or homeowners' association, may make Units non-smoking prior to January 1, 2011.

(1) Required Lease Terms: By January 1, 2011, every lease or other agreement for the occupancy of a Unit in an existing Multi-Unit Residence shall include:

- a. A clause stating the Smoking is prohibited in the Unit;
- b. A clause stating that it is a material breach of the lease or agreement to (i) violate any law regulating Smoking while on the Premises; (ii) Smoke in the Unit; or (iii) Smoke in any Multi-Unit Residence Common Area in which smoking is prohibited; and
- c. A clause stating that all occupants of the Multi-Unit Residence are express third-party beneficiaries of the above required clauses.

(2) The California Apartment Association's Form 34.0, revised 1/07, meets the requirements for lease terms as outlined and is an option for use to comply with this section.

(d) The lease or agreement terms required by subsection (a) and (b) 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 subsection (a) or (b).

(e) A tenant who breaches the Smoking regulations of a lease or knowingly allows another Person to do so shall be liable to: (i) the Landlord; and (ii) 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.

(f) 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.

7.57.040 Disclosure of Designated Smoking Area.

Every Person with legal control over a Multi-Unit Residence, such as, for example, a Landlord or homeowners' association, shall maintain a diagram that illustrates the precise location and configuration of the designated Smoking area. This diagram shall accompany every lease or other agreement for the occupancy of a Unit in a Multi-Unit Residence after January 1, 2011.

7.57.050 Prohibitions and Duties Generally.

(a) Smoking is prohibited in any non-smoking area of a Multi-Unit Residence established by this Chapter or other law.

(b) No Person shall knowingly permit Smoking in an area of the Premises under his or her legal or de facto control in which Smoking is prohibited by this Chapter, this Code, or any other state or federal law provided, however, that this prohibition does not apply to a Person who is already compelled to act under state or federal law.

(c) No Person shall knowingly permit the presence or placement of ash trays, cans, or other receptacles within Multi-Unit Residence Common Areas under his or her legal or de facto control in which Smoking is prohibited by this Chapter, this Code, or any other state or federal law, including, for example and without limitation, within a Reasonable Distance of any non-smoking area.

(d) "No Smoking" signs, with letters of no less than one inch in height or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red

circle crossed by a red bar) shall be clearly and conspicuously posted in Multi-Unit Residence Common Areas, at every entrance and exit, and on every floor near the elevator bank where Smoking is prohibited by this Chapter or other law. Such signs shall be maintained by the Person or Persons with legal control over the Multi-Unit Residence Common Areas and entrances and exits. Signs must be posted in sufficient numbers and locations in the Multi-Unit Residence Common Areas and at entrances and exits to make areas where Smoking is prohibited obvious to a reasonable Person. Signs are not required at the individual entrance and exits of each Multi-Unit Residence. The absence of signs shall not be a defense to a violation of any provision of this Chapter.

(e) This Chapter shall not create additional liability for a Landlord for a Person's violation of this Chapter provided that the Landlord has fully complied with the required disclosure, sign posting, and other provisions of this Chapter.

(f) The provisions of this Chapter are restrictive only and establish no new rights for a smoker.

(g) Notwithstanding any provision of this Chapter or other provisions of this Code or failure to restrict Smoking under this Chapter including any explicit or implicit provision that allows Smoking, nothing in this Chapter shall operate to limit any Person's legal rights under other laws with regard to Smoking, including, for example, claims of nuisance, trespass, property damage, and personal injury.

(h) The City Manager or his or her designee shall disseminate annually a brochure discussing the prohibitions and duties associated with this Chapter.

7.57.060 Medical Marijuana.

Notwithstanding any other provision of this Chapter, Smoking marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* in any Unit of a Multi-Unit Residence is not prohibited by this Chapter, so long as the Smoke is not detectable by or an annoyance to other tenants. Notwithstanding the forgoing, such use of marijuana may be prohibited by other provisions of this Code, state law, or federal law.

7.57.070 Enforcement.

The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

(a) Each violation of this Chapter by a Person because of the Person's Smoking is subject to a one hundred dollar (\$100) fine. 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 may also enforce this Chapter.

(b) Violations of this Chapter are subject to a civil action brought by the City of Richmond, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

(c) No Person shall intimidate, harass, or otherwise retaliate against any Person who seeks compliance with this Chapter. Moreover, no Person shall intentionally or recklessly expose another Person to smoke in response to that Person's effort to achieve compliance with this Chapter. Violation of this subsection shall constitute a misdemeanor.

(d) Causing, permitting, aiding, or abetting a violation of any provision of this Chapter shall also constitute a violation of this Chapter.

(e) A violation of this Chapter is hereby declared to be a public nuisance.

(f) 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 or criminal code enforcement proceedings, and suits for injunctive relief.

7.57.080. Private Enforcement.

(a) A Private Enforcer may bring a civil action to enforce this Chapter. Upon proof of a violation, a court shall award the following:

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$500 for each violation of this Chapter (hereinafter “Statutory Damages”). Unless otherwise specified in this Chapter, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this Chapter, no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this Chapter if a previous claim brought on behalf of the general public by a Private Enforcer or the City for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Private Enforcer was a party to that adjudication.

(2) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, retaliation, or a conscious disregard for the public health.

(b) The Private Enforcer may also bring a civil action to enforce this Chapter by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

(c) Nothing in this Chapter prohibits a Private Enforcer from bringing a civil action in small claims court to enforce this Chapter, so long as the amount in demand and the type of relief sought are within the jurisdictional requirements set forth in California Code of Civil Procedure section 116.220.

SECTION 3

If any section, subsection, paragraph, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be unconstitutional or invalid, the remaining portions of this Ordinance shall remain in full force and effect. The City Council hereby declares that it would have passed each section, subsection, paragraph, sentence, clause or phrase of this Ordinance irrespective of the unconstitutionality or invalidity of any section, subsection, paragraph, sentence, clause or phrase.

SECTION 4

This Ordinance becomes effective thirty (30) days after its final passage and adoption.

First introduced at a regular meeting of the City Council of the City of Richmond held on July 7, 2009, and finally passed and adopted at a regular meeting held on **July 21, 2009**, by the following vote:

AYES: Councilmembers Bates, Butt, Ritterman, Rogers, Viramontes, Vice Mayor Lopez, and Mayor McLaughlin.

NOES: None.

ABSTENTIONS: None.

ABSENT: None.

DIANE HOLMES
CLERK OF THE CITY OF RICHMOND

(SEAL)

Approved:

GAYLE McLAUGHLIN
Mayor

Approved as to form:

RANDY RIDDLE
City Attorney

State of California }
County of Contra Costa } : ss.
City of Richmond }

I certify that the foregoing is a true copy of Ordinance No. 23-09 N.S., finally passed and adopted by the Council of the City of Richmond at a regular meeting on July 21, 2009.