

NEW YORK MODEL ORDINANCE TO PROHIBIT TOBACCO USE AND SMOKING IN SPECIFIED OUTDOOR AREAS

SECTION 1: FINDINGS.

The [Common Council] of [City] hereby finds and declares as follows:

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, accounting for about 443,000 deaths each year;
- In New York State there are 25,500 deaths every year from causes attributable to smoking; and
- Tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;

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;
- Secondhand smoke exposure causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis, exacerbates childhood asthma, and increases the risk of acute, chronic, middle ear infection in children;
- Secondhand smoke has been designated as a known human carcinogen by the Environmental Protection Agency and the Public Health Service's National Toxicology Report;
- The 2006 U.S. Surgeon General's Report on Involuntary Exposure to Secondhand Smoke concludes that even brief exposures to secondhand smoke may increase the severity of asthma attacks and lower respiratory tract infections, especially in children, and have adverse effects on the heart; and
- Secondhand smoke is responsible for approximately 47,400 deaths among nonsmokers each year in the United States;

Smokeless tobacco is not a safe alternative to smoking and also causes death and disease, as evidenced by the following:

- Smokeless tobacco use causes leukoplakia, a disease causing white patches to form in the user's mouth that can become cancerous;
- Smokeless tobacco products are known to cause lung, larynx, esophageal, and oral cancer; and
- The regular use of snuff doubles the user's risk of cardiovascular disease and death;

This model ordinance addresses tobacco use in outdoor areas such as recreational areas and beaches. Section 3(B) additionally prohibits smoking in other outdoor areas, including multi-unit housing common areas and the immediate vicinity of building entrances.

This model should be further crafted to best suit your locality's needs. For example, a local government may wish to convert the model ordinance into another format. Please consider contacting our center to discuss such modifications to the model ordinance.

This model ordinance is based on models developed by Public Health Law & Policy (www.phlpnet.org) for the California Tobacco Control Program.

Adapted for use with the permission of the California Department of Public Health, California Tobacco Control Program.

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

- 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 a burning cigarette;
- 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; and
- A 2006 study by the California Air Resources Board found that at typical outdoor locations, persons may be exposed to tobacco smoke levels as high as indoor secondhand smoke concentrations;

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

- Over two billion cigarette butts are discarded every day worldwide, and Americans alone discard more than 175 million pounds of cigarette butts every year;
- Cigarette filters have been found in the stomachs of fish, birds, and other animals that mistake them for food, thus swallowing harmful plastic and toxic chemicals; and
- Cigarette filters and plastic wraps from cigarette packages are not biodegradable and tobacco-related waste discarded in parks, along sidewalks, and in street gutters makes its way through storm drains into creeks and rivers, leaking dangerous chemicals into our watershed;

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

- In 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarettes, cigarette butts, and other tobacco products; and
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;

Children are currently unprotected from tobacco smoke in outdoor areas where they are likely to be present, such as our **[City]**'s playgrounds;

Each day more than 4,000 youth nationwide try smoking for the first time, and another 2,000 youth become regular daily smokers;

Creating smoke free zones in certain public spaces where children and adults are likely to congregate and/or where persons cannot readily escape from exposure to tobacco smoke will protect the health, safety and welfare of the residents of our community;

Consider adding findings specific to your local municipality in order to better demonstrate the need for a tobacco-free outdoor areas ordinance in your community.

NOW THEREFORE, it is the intent of **[Common Council]**, in enacting this ordinance, to provide for the public health, safety, and welfare by protecting the public and the environment from tobacco-related litter; by discouraging the inherently dangerous behavior of smoking around non-tobacco users, especially children; by protecting the public from exposure to secondhand smoke where people play, exercise, and relax; by reducing the potential for children to wrongly associate tobacco use with a healthy lifestyle; and by affirming and promoting a healthy environment in and around the **[City]**'s recreational areas.

SECTION 2: DEFINITIONS

As used in this Chapter, the following terms shall have the meanings indicated:

(A) **Beach** means any outdoor area along a shoreline of an ocean or lake and extending **[one thousand (1,000) feet]** from the shoreline that is owned or operated by the **[City]** **[or that is open to the general public, regardless of any fee or age requirement].**

(B) **Entrances and Exits** means the passageways by which persons may enter a building, typically consisting of a door or doorway. For the purposes of this chapter, this includes the stoop, steps, or ramp leading from the sidewalk or pavement to such a door or doorway.

(C) **Food Service Establishment** means any business establishment, including outdoor seating areas thereof, in which the business includes the sale of food or beverages for on-premises consumption.

(D) **Multi-Unit Common Area** means any indoor or outdoor area at a multi-unit residential property containing three or more units (including rental properties and condominiums) that is accessible to and usable by the occupant of more than one unit, including but not limited to halls, walkways, lobbies, laundry rooms, common cooking areas, outdoor dining areas, patios, play areas, swimming pools, gardens, and parking lots.

(E) **Person** means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity except the **[City]**.

(F) **Playing Field** means that portion of an outdoor Recreational Area that is set up and marked in some way for the playing of one or more specific games or sports (such as baseball, football, or soccer), and that is **[owned or operated by the City and]** open to the general public. For the purposes of this chapter, a playing field that is fenced or the outside perimeter of which is otherwise physically demarcated shall be deemed to include all of

§ 2(A) COMMENT: The definition of and references to “Beach” may be omitted if unnecessary. The definition of “Beach” is designed to be measurable in all situations and can be adapted to your community (e.g., the number of feet listed in brackets can be changed). A less precise definition may be more appropriate for communities that have beaches with obvious boundaries. One option is to list the names of the specific beaches where the ordinance would apply (for example: “Beach” means Baker Beach and Walden Beach).

If a community wants to prohibit tobacco product use on private beaches open to the public, then include the “*open to the general public*” language provided in brackets at the end of the definition.

§ 2(B) COMMENT: The model ordinance prohibits smoking near entrances and exits. The model could be modified to address smoking near operable windows as well.

§ 2(D) COMMENT: If it is an issue in your community, contact our center to discuss how to address college dormitories.

the area inside such fence or demarcation, together with any bleachers or other designated viewing area; a playing field that is not fenced or otherwise demarcated (as to its outside perimeter) shall be deemed to include all of the area customarily required for playing the game for which it is being used, together with any bleachers or other designated viewing area.

(G) **Reasonable Distance** means a distance that ensures that people located within an area in which smoking is prohibited are not exposed to secondhand smoke created by smokers outside the area. This distance shall be a minimum of **[twenty (20 feet)]** in any direction.

(H) **Recreational Area** means any outdoor area that is **[owned or operated 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 Playing Fields, playgrounds, parks, picnic areas, golf courses, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, roller- and ice-skating rinks, skateboard parks, and amusement parks. The term “Recreational Area” is not intended to include streets and sidewalks unless they are located within a demarcated Recreational Area such as a park.

(I) **Service Area** means any area designed to be or regularly used by one or more persons to receive or wait to receive a service, enter a public place, or make a transaction, whether or not such service includes the exchange of money. Service Areas include, but are not limited to, bus stops and other mass transit shelters, ATMs, public telephones, ticket lines, bus stops, cab stands, concert lines, sporting event lines, and food vendor lines.

(J) **Smoking** means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, in any manner or in any form.

(K) **Tobacco Product** means any manufactured product containing tobacco or nicotine, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges. However, “Tobacco Product” does not include any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and is being marketed and sold solely for that approved purpose.

§ 2(E) COMMENT: The municipal code likely contains a definition of Person and, if so, the definition provided here can be deleted. The city is excluded from the definition so that it does not make itself potentially liable for not fully enforcing the ordinance due to practical limitations.

§ 2(G) COMMENT: The minimum Reasonable Distance amount should be set to a distance that best fits the community and its needs.

§ 2(H) COMMENT: The definition of “Recreational Area” can apply to all recreational areas that are open to the general public, whether on public or private land. If the community wants to limit the reach of the ordinance to only include publicly owned or operated recreational facilities, then insert the phrase “*owned or operated by the City.*”

§ 2(K) COMMENT: The definition of “Tobacco Product” is written broadly to include cigarettes, other smoked tobacco products, smokeless tobacco, and nontraditional tobacco products such as electronic cigarettes and dissolvable tobacco products. The definition does not include FDA-approved smoking cessation aids.

SECTION 3: PROHIBITION OF TOBACCO PRODUCT USE IN OUTDOOR AREAS AND COMMON AREAS OF MULTI-UNIT HOUSING

(A) The use of Tobacco Products is prohibited in all of the following places within the **[City]**:

- (1) Beaches;
- (2) Recreational Areas;
- (3) Food Service Establishments; and
- (4) All outdoor areas of property owned or leased by the **[City]** for official government use.

(B) Smoking is further prohibited in the following places within the **[City]**:

- (1) Within a reasonable distance of Entrances and Exits to buildings within which smoking is prohibited by Article 13-E of the New York Public Health Law;
- (2) Within a reasonable distance of Food Service Establishments, including the outdoor areas thereof;
- (3) Outdoor Service Areas and within a reasonable distance thereof; and
- (4) Multi-Unit Common Areas.

(C) The prohibitions in Section 3(B) shall not apply to outdoor areas of private residential properties that are not Multi-Unit Common Areas.

(D) Nothing in this Chapter prohibits any Person with legal control over any property from prohibiting Smoking and Tobacco Product use on any part of such property, even if Smoking or the use of Tobacco Products is not otherwise prohibited in that area.

[(E) The Director of _____ or his/her designee shall engage in an ongoing educational program to explain and clarify the purposes and requirements of this Chapter. However, lack of such education shall not be a defense to a violation of this Chapter.]

§§ 3(A) & (B) COMMENT:

The restrictions in § 3(A) apply to all tobacco use, including the use of smokeless tobacco. The provisions of § 3(B) are focused on reducing exposure to secondhand smoke and apply only to smoking.

§ 3(B)(4) COMMENT:

We can work with you to create an exception for a designated smoking area that is outdoors and away from residential units and recreational areas.

§ 3(E) COMMENT:

This optional provision would require that the city or county provide education to those affected by this ordinance. You should identify which government official should be in charge of this program.

SECTION 4: 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 permit Smoking or the use of Tobacco Products in an area under the Person's control in which Smoking or the use of Tobacco Products is prohibited by this Chapter;

(C) The Department of _____ shall issue requirements about the content and placement of signage advising the public of the restriction of Tobacco Products usage and/or Smoking in the designated areas.

(D) The presence of Smoking waste receptacles in violation of subsection (A) above and the absence of signs required by subsection (C) above shall not be a defense to a violation of any provision of this Chapter.

(E) No Person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or customer because that employee, applicant, or customer exercises any rights afforded by this Chapter or reports or attempts to report a violation of this Chapter.

SECTION 5: 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 instance of Smoking or Tobacco Product use in violation of this Chapter shall constitute a separate violation. For violations other than Smoking or Tobacco Product use, each day of a continuing violation of this Chapter shall constitute a separate violation.

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

(D) Each violation of this Chapter constitutes an infraction subject to a **[one hundred dollar (\$100)]** fine.

(E) Enforcement of this Chapter shall be the responsibility of [_____]. In addition, any peace officer or code enforcement official may enforce this Chapter.

(F) Any violation of this Chapter is hereby declared to be a nuisance.

(G) 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

§ 4(C) COMMENT: Signage requirements can be more detailed. In this model ordinance, because of the diversity of outdoor areas covered, a department is charged with and given the flexibility to create and adjust appropriate signage requirements.

§ 5(D) COMMENT: The penalty for all violations is \$100 per incident. The fine amount can be modified. This enforcement provision allows law enforcement officers to simply write a ticket for illegal Smoking and Tobacco Product use or for the actions described in § 5(C).

§ 5(E) COMMENT: This provision designates a primary enforcement agency, but remains flexible by permitting any enforcement agency to enforce the law.

§ 5(F) COMMENT: By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the City via the administrative nuisance abatement procedures commonly found in municipal codes.

the City Attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, code enforcement proceedings, and suits for injunctive relief.

[(H) 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.]

(I) Any Person may bring a civil action to enjoin a violation of this Chapter by a business or to enjoin repeat violations of this Chapter by an individual.

SECTION 6: STATUTORY CONSTRUCTION & SEVERABILITY

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

SECTION 7: EFFECTIVE DATE

The effective date of this ordinance shall be sixty (60) days from the date of its enactment.

§ 5(H) COMMENT: This is an optional provision, which makes clear that the City cannot be liable to any Person for failure to enforce the restrictions in this ordinance.

§ 5(I) COMMENT: This provision enables private citizens to go to court to seek compliance with the ordinance by an individual or business through an injunction (a court order to do or not do something).

Note that while a civil action may be brought against a business for one violation of this ordinance, an action can be brought against an individual only for repeat violations. This limitation is intended to address concerns about the potential for abusive lawsuits.

The Center for Public Health & Tobacco Policy
at New England Law | Boston
www.tobaccopolicycenter.org

NEW ENGLAND LAW  BOSTON
154 Stuart St.
Boston, MA 02116

Contact:
Phone: 617-368-1465
Fax: 617-368-1368
tobacco@nesl.edu

The Center for Public Health & Tobacco Policy is a resource for the New York tobacco control community. It is funded by the New York State Department of Health and works with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York.

The Center's work provides educational materials and research support for policy initiatives and does not constitute and cannot be relied upon as legal advice.