

**ORDINANCE NO. XXX N. S.**

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN  
OF TIBURON AMENDING PROVISIONS OF TITLE VI,  
CHAPTER 28 OF THE TIBURON MUNICIPAL CODE  
(SMOKING AND TOBACCO REGULATIONS)**

The Town Council of the Town of Tiburon does ordain as follows:

**Section 1.     Findings.**

- A.     On July 20, 2011 the Town Council adopted Ordinance No. 531 N. S. making substantial revisions to its smoking and tobacco regulations; said regulations were further amended in October 2014 by adoption of Ordinance No. 553 N. S. addressing electronic smoking devices, and in June 2017 by adoption of Ordinance No. 571 N. S. making various other amendments.
  
- B.     The Town Council now desires to further revise the Town's regulations concerning smoking by expanding the prohibition on smoking and tobacco use in multi-unit residences (including two-family dwellings and condominium/townhouse units), in multi-unit residence common areas, in public places such as streets and sidewalks, and in other shared or public areas, and by making various other amendments. The Town Council also desires to further regulate the sale of tobacco products by requiring a conditional use permit for the sale of such products within the Town.
  
- C.     The Town Council held a public hearing on \_\_\_\_\_, 2018 and heard and considered any and all public testimony and correspondence on this matter.
  
- D.     The Town Council finds that all notices and procedures required by law attendant to the adoption of this Ordinance have been followed.
  
- E.     The Town Council finds the amendments made by this Ordinance are necessary for the protection of the public health, safety, and welfare.
  
- F.     The Town Council finds the amendments made by this Ordinance are consistent with the goals and policies of the Tiburon General Plan and other adopted ordinances and regulations of the Town.
  
- G.     The Town Council finds these amendments are covered by the general rule that the California Environmental Quality Act (CEQA) applies only to projects that have the potential for causing a significant effect on the environment pursuant to CEQA Guidelines Section 15061(b)(3), and further finds that if the amendments were not covered by the above section, the amendments would be categorically exempt pursuant to Section 15305 of the CEQA Guidelines.

**Section 2. Amendments to Title VI, Chapter 28.**

Title VI, Chapter 28 of the Tiburon Municipal Code is hereby amended as follows:

- (A) Sections 28-3, 28-4, 28-5, 28-7, 28-8, 28-9, 28-12, and 28-13 are repealed in their entirety.
- (B) In Section 28-2, the definitions of “Multi-unit common area”, “Outdoor eating area”, “Separate ventilation system”, “Sports arena”, and “Tobacco product” are repealed in their entirety.
- (C) In Section 28-2, the definition of “Child care facility” is added to read as follows:

“Child care facility” means any family day care regulated by Sections 1597.30 through 1597.621 of the California Health and Safety Code (or successor sections thereto) and any day care center for children regulated by Section 1596.90 et seq. of the California Health and Safety Code (or any successor section thereto). It does not include foster homes or residential care facilities.
- (D) In Section 28-2, the definition of “Common area” is added to read as follows:

“Common area” means every enclosed area and 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, paths, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, restrooms, laundry rooms, cooking areas, and eating areas.
- (E) In Section 28-2, the definition of “Dining area” is added to read as follows:

“Dining area” means any area, including streets and sidewalks, which is available to or customarily used by the general public, and which is designed, established, or regularly used for consuming food or drink.
- (F) In Section 28-2, the definition of “Enclosed area” is amended to read as follows:

“Enclosed area” means an area in which outside air cannot circulate freely to all parts of the 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 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 walls or other vertical constraints to airflow including, but not limited to, vegetation that exceeds six feet in height, whether or not those constraints include vents or other openings.

- (G) In Section 28-2, the definition of “Multi-unit residence” is amended to read as follows:

“Multi-unit residence” means, for purposes of this chapter, a premises containing two or more units, including, but not limited to, a common interest complex, except the following specifically excluded types of housing as defined in Chapter 16 of this Code:

(1) A single-family dwelling, including enclosed areas and unenclosed areas on its premises;

(2) A detached two-family dwelling, including enclosed areas and unenclosed areas on its premises;

(3) A mobile home park unit, including enclosed and unenclosed areas on its premises.

- (H) In Section 28-2, the definition of “Public place” is amended to read as follows:

“Public place” means any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement, including, but not limited to: bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, buses, bus shelters, public transportation facilities, hotels and motels, bed and breakfast facilities, fairs, farmers' markets, theaters, sidewalks and streets. “Public place” does not mean within private vehicles in or on public places.

- (I) In Section 28-2, the definition of “Reasonable distance” is amended to read as follows:

“Reasonable distance” means a distance of twenty-five (25) feet in any direction from an area in which smoking is prohibited.

- (J) In Section 28-2, the definition of “Recreational area” is added to read as follows:

“Recreational area” means any area that is publicly or privately owned 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, open spaces, picnic areas, playgrounds, sports fields, tennis courts, walking paths, gardens, hiking trails, bike paths, riding trails, swimming pools, marinas, and amusement parks.

- (K) In Section 28-2, the definition of “Tobacco product” is added to read as follows:

“Tobacco product” means:

- (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and
- (2) any electronic smoking device.
- (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, “tobacco product” includes any component, part, or accessory of a tobacco product, whether or not sold separately. “Tobacco product” does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

- (L) In Section 28-2, the definition of “Unenclosed area” is added to read as follows:

“Unenclosed area” means any area that is not an ‘enclosed area’, as that term is defined in this section.

- (M) In Section 28-2, the definition of “Unit” is amended to read as follows:

“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; an attached two-family dwelling; 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 dwelling; and an accessory dwelling unit or guest house appurtenant to a single-family dwelling.

- (N) Section 28-3 is added to read as follows:

**28-3 Smoking and Tobacco Product Use Prohibited in Town-owned Facilities and Town Vehicles.**

Smoking and use of tobacco products is prohibited in all Town-owned, Town-leased, and Town-operated vehicles, including jitneys and buses and other means of public transit under the authority of the

Town, and in all enclosed residential and non-residential facilities, buildings, or structures owned, leased, occupied and/or controlled by the Town.

(O) Section 28-4 is added to read as follows:

28-4 Prohibition of Smoking and Tobacco Product Use in Enclosed Areas.

- (a) Smoking and the use of tobacco products are prohibited in the enclosed areas of the following places within the Town:
  - (1) Public places; and
  - (2) Multi-unit residences and common areas; and
  - (3) Dining areas; and
  - (4) Service areas.
- (b) Smoking and the use of tobacco products are prohibited in all other enclosed areas except as provided below:
  - (1) Inside private vehicles when no minors are present;
  - (2) Inside private single-family dwellings, except when used as a child care facility or a health care facility;
  - (3) Inside detached accessory structures appurtenant to private single-family dwellings, including accessory dwelling units;
  - (4) Inside private detached two-family dwellings and detached accessory structures appurtenant thereto;
  - (5) Inside retail tobacco stores, only if:
    - (A) The retail tobacco store does not sell edible products, including, for example, food, water, or drinks, and does not allow such products to be consumed on the premises; and
    - (B) The retail tobacco store prohibits minors from entering the store at all times.
  - (6) Inside an enclosed place of employment that employs only the owner and no other employees or any other independent contractors routinely spending time performing work in the enclosed areas, provided that:
    - (A) The place of employment is not a public place, and
    - (B) The enclosed area containing the place of employment does not share a ventilation system with any other enclosed place of employment or public place.

(P) Section 28-5 is added to read as follows:

Section 28-5 Prohibition of Smoking and Tobacco Product Use in Unenclosed Areas; Exception for Designated Smoking Areas.

- (a) Smoking and the use of tobacco products are prohibited in the unenclosed areas of the following places within the Town:
  - (1) Recreational areas;
  - (2) Service areas;
  - (3) Public places, including streets and sidewalks open to the public;
  - (4) Dining areas;
  - (5) Bars;
  - (6) Common areas of multi-unit residences.
- (b) Notwithstanding subsection (a) above, multi-unit residences, places of employment, town-owned or controlled public places, and public events may designate an unenclosed area where smoking or use of tobacco products is permitted if the area meets all of the following criteria:
  - (1) The area is located a reasonable distance of at least twenty-five (25) feet 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 premises. A designated smoking area may require modification or elimination as laws change, as binding agreements are created, and as nonsmoking areas on nearby premises are established;
  - (2) The area does not include, and is at least one hundred (100) feet from, unenclosed areas primarily used by children and unenclosed areas with improvements that facilitate physical activity including, for example, playgrounds, swimming pools, and school campuses;
  - (3) The area includes no more than twenty-five percent (25%) of the total unenclosed area of a multi-unit residence if located within the premises of a multi-unit residence;
  - (4) The area has a clearly marked perimeter;
  - (5) The area is identified by conspicuous signs;
  - (6) The area is completely within an unenclosed area; and
  - (7) The area does 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.
- (c) Nothing in this section prohibits any person or nonprofit entity 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.

(Q) Section 28-7 is added to read as follows:

28-7 Smoking Restrictions for New and Existing Units of Multi-unit Residences; Responsibilities of Homeowner Association in Common Interest Complexes.

(a) With respect to all existing units of multi-unit residences in which smoking was not prohibited by this chapter prior to *{insert effective date of this Ordinance}*, said units shall become subject to the provisions of this chapter sixty (60) days following *{insert effective date of this Ordinance}*.

(b) Notwithstanding subsection (a) above to the contrary, each and every unit of a multi-unit residence, the occupancy of which becomes available for the first time on or after *{insert effective date of this Ordinance}*, shall be subject to and controlled by this chapter.

(c) The homeowners association, or its duly-appointed management agent, for each common interest complex subject to this chapter shall, within sixty (60) days of *{insert effective date of this Ordinance}*:

(1) Establish a smoke-free policy that meets or exceeds the applicable provisions of this chapter with respect to the indoor or outdoor areas of the entire premises;

(2) Notify all owners and residents within the common interest complex of the smoke-free policy, including a provision that explains that violations will be treated in the same way as noise pollution or other rules;

(3) Post signs at the parking lot entrances that notify owners, residents, their visitors and contractors about the smoke-free policy; and

(4) Establish a process for addressing complaints, similar to that used for violations of other homeowner association policies.

(R) Section 28-8 is added to read as follows:

28-8 Required and Implied Lease Terms for Units in Multi-unit Residences, Signage, Etc.

(a) Required lease terms. Every lease or other agreement for the occupancy of a unit in a new or existing multi-unit residence shall, consistent with provisions of Section 28-7, include all of the following:

(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 1) violate any law regulating smoking while on the premises; 2) smoke in any unit; 3) smoke in a common area of the premises except in an unenclosed designated smoking area, provided that one lawfully exists pursuant to Section 28-5(b);

(C) A clause stating that all lawful occupants of the multi-unit residence are express third-party beneficiaries of the above-required clauses.

(b) Whether or not a landlord complies with subsection (a) above, the clauses required by that subsection shall be implied and incorporated by law into every agreement to which subsection (a) above applies.

(c) A tenant who breaches a smoking or tobacco product use provision of a

lease or other agreement or knowingly allows another person to do so shall be liable to:

- (1) The landlord; and
- (2) To any lawful 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 or tobacco product use provisions if the landlord has fully complied with the requirements of this chapter.

(d) Failure to enforce any smoking or tobacco product use provision of a lease or other agreement on one or more occasions shall not constitute a waiver of the lease or agreement provisions required by this section and shall not prevent future enforcement of any such smoking regulation on another occasion.

(e) Disclosure of designated smoking area. Every landlord shall maintain a diagram that illustrates the precise location and configuration of any designated smoking area. This diagram shall accompany every new lease, lease renewal, lease extension, or other agreement for the occupancy of a unit in a multi-unit residence.

(f) "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 the common areas of multi-unit residences, at every entrance and exit, and on every floor near an elevator or common stairwell. Such signs shall be maintained by the landlord. The absence of signs shall not be a defense to a violation of any provision of this chapter.

(g) This section 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 section and section 28-5(b).

(h) Failure to enforce any smoking provision required by this section shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision itself.

(S) Section 28-9 is added to read as follows:

#### 28-9 Other Requirements and Prohibitions.

(a) No person or nonprofit entity shall knowingly permit smoking or the use of tobacco products in an area which is under the legal or de facto control of that person or nonprofit entity and in which smoking or the use of tobacco products is prohibited by law.

(b) No person or nonprofit entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or

ash cans, within an area under the legal or de facto control of that person or nonprofit entity and in which smoking or the use of tobacco products is prohibited by law, including, without limitation, within a reasonable distance as defined in this chapter from any area in which smoking or the use of tobacco products is prohibited. Notwithstanding the foregoing, the presence of ash receptacles in violation of this chapter shall not be a defense to a charge of smoking or the use of tobacco products in violation of any provision of this chapter.

(c) No person shall dispose of used smoking or tobacco product waste within the boundaries of an area in which smoking or tobacco product use is prohibited, including within a reasonable distance as defined in this chapter.

(d) Each instance of smoking or the use of tobacco products in violation of this chapter shall constitute a separate violation. For violations other than for smoking or the use of tobacco products in violation of this chapter, each day of a continuing violation of this chapter shall constitute a separate violation.

(T) Section 28-11(a) is amended to read as follows:

(a) Any person, business, tobacco retailer, retail tobacco store, or other establishment subject to this chapter shall post plainly visible signs at each point of purchase of tobacco products that state "THE SALE OF TOBACCO PRODUCTS TO PERSONS UNDER 21 YEARS OF AGE IS PROHIBITED BY LAW. PHOTO ID REQUIRED. THE FINE FOR BUYING TOBACCO FOR ANYONE UNDER 21 IS \$200". The letters on said signs shall be at least one-half inch tall. These signs shall be updated as necessary to conform to any subsequent state or federal requirements or amendments to Business and Professions Code section 22952 and/or Penal Code section 308(a) or successor sections thereto.

(U) Section 28-11(c) is amended to read as follows:

(d) Sale of tobacco products at pharmacies is prohibited. All other vendor-assisted sales of tobacco products in the Town shall require prior issuance of a conditional use permit pursuant to Title IV, Chapter 16 (Zoning) of this Code. It shall be unlawful for any person, business, tobacco retailer, or retail tobacco store to sell, permit to be sold, or offer for sale any tobacco product by means of self-service merchandising, or by any means other than vendor-assisted sales.

(V) Section 28-12 is added to read as follows:

28-12 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 or use of tobacco products or other conduct in violation of this chapter shall be subject to enforcement pursuant to Chapter 31 of this Code.

(c) The health department officer shall require, while an establishment is undergoing otherwise mandatory inspections, certification from the owner, manager, operator or other person having control of such establishment that all requirements of this chapter have been complied with.

(d) Violations of this chapter are subject to a civil action brought by the Town, punishable by a civil fine not less than two hundred fifty dollars (\$250.00) and not exceeding one thousand dollars (\$1,000.00) per violation.

(e) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of 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, this code, or by other law, any violation of this chapter may be remedied by a civil action brought by the town attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

(h) 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 awarding damages and/or issuing an injunction or a conditional judgment.

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

(j) The purposes of this chapter are to restrict and/or prohibit smoking and use of tobacco products for the benefit of the public health, safety and welfare. This chapter establishes no new rights for a person who engages in smoking or the use of tobacco products. Notwithstanding (1) any provision of this chapter or other provisions of this code; (2) any failure by any person to restrict smoking or use of tobacco products under this chapter; or (3) any explicit or implicit provision of this chapter that allows smoking or use of tobacco products in any place; nothing in this chapter shall be interpreted to limit any person's legal rights to seek redress or recovery of damages under other laws as a result of smoking or use of tobacco products, including, for example, rights in nuisance, trespass, property damage, and personal injury or other legal or equitable principles.

(W) Section 28-13 is added to read as follows:

28-13 Violations and penalties.

- (a) It is unlawful for any person or non-profit entity who owns, manages, operates or otherwise controls the use of any premises or areas subject to regulation under sections 28-3, 28-4, 28-5, 28-6, 28-7, 28-8, 28-9, 28-10, 28-11, or 28-14 of this chapter to fail to comply with any of its provisions.
- (b) It is unlawful for any person to smoke or use tobacco products in any area where smoking or use of tobacco products is prohibited under provisions of this chapter.
- (c) Any person, non-profit entity, business, retail tobacco store, or owner, manager or operator of any establishment subject to this chapter who violates any provision of this chapter, other than section 28-11, shall be deemed guilty of an infraction and upon conviction shall be subject to payment of a fine not less than two hundred fifty dollars (\$250.00) and not exceeding one thousand dollars (\$1,000.00) per violation.
- (d) Violations of section 28-11 shall be a misdemeanor.

**Section 3. Severability.**

If any section, subsection, clause, sentence, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a decision of a Court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Ordinance. The Town Council of the Town of Tiburon hereby declares that it would have passed this Ordinance, any section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases may be declared invalid or unconstitutional.

**Section 4. Effective Date.**

This ordinance shall be in full force and effect thirty (30) days after the date of adoption. Pursuant to the provisions of the California Government Code, a summary of this ordinance shall be prepared by the Town Attorney. At least five (5) days prior to the Town Council meeting at which adoption of the ordinance is scheduled, the Town Clerk shall (1) publish the summary in a newspaper of general circulation in the Town of Tiburon, and (2) post in the office of the Town Clerk a certified copy of this ordinance. Within fifteen (15) days after the adoption of this ordinance, the Town Clerk shall (1) publish the summary in a newspaper of general circulation in the Town of Tiburon, and (2) post in the office of the Town Clerk a certified copy of the ordinance along with the names of those Council members voting for and against the ordinance.

This ordinance was read and introduced at a regular meeting of the Town Council of the Town of Tiburon, held on \_\_\_\_\_, 2018, and was adopted at a regular meeting of the Town Council of the Town of Tiburon, held on \_\_\_\_\_, 2018, by the following vote:

AYES:            COUNCILMEMBERS:

NAYS: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

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JIM FRASER, MAYOR  
TOWN OF TIBURON

ATTEST:

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LEA STEFANI, TOWN CLERK