

ORDINANCE No. 2016 -720

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FORTUNA REPLACING
CHAPTER 8.28, OF TITLE 8, OF THE FORTUNA MUNICIPAL CODE, RELATING TO
NONSMOKING REGULATIONS**

WHEREAS, tobacco use causes death and disease and continues to be a public health challenge; and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard; and

WHEREAS, exposure to secondhand smoke causes death and disease; and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs; and

WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, and

WHEREAS, cigarette butts pose a health threat to young children; and

WHEREAS, cigarette butts are a major and persistent source of litter; and

WHEREAS, laws restricting the use of tobacco products have recognizable benefits to public health and medical costs; and

WHEREAS, creating smoke free areas helps protect the health of Californians who are nonsmokers; and

WHEREAS, society is becoming less tolerant and less accepting of cigarette smoking; 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 potentially be exposed; and

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

WHEREAS, there is no Constitutional right to smoke; and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance; and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance, 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; by affirming and promoting a healthy environment in and around the City's outdoor places.

THE CITY COUNCIL OF THE CITY OF FORTUNA DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1: DECLARATION OF INTENT

The purpose of this ordinance is to encourage voluntary cooperation and self-regulation by all persons who smoke so that their conduct conforms to the standards established by this ordinance.

To that end, and for a period of six months after the date this ordinance becomes effective, the City shall encourage an informational and educational effort to inform all citizens of their obligations under this ordinance. This effort will be undertaken at the request of the City by the Humboldt County Health Department, Tobacco Free Humboldt, and such other organizations as may be called upon by the City.

No criminal, civil or administrative enforcement shall be undertaken during this six month period. Thereafter and without any further formal action by the City, the enforcement provisions contained in Section 8.78.080 of this Chapter shall become operative.

SECTION 2. AMENDMENT

Chapter 8.28 of the Fortuna Municipal Code is hereby replaced in its entirety to read as follows:

Chapter 8.28 Nonsmoking Regulations

Sections:

- 8.28.010 Definitions
- 8.28.020 Prohibition of Smoking in Enclosed Areas
- 8.28.030 Prohibition of Smoking in Unenclosed Areas
- 8.28.040 Reasonable Smoking Distance Required
- 8.28.050 Disclosure of Nonsmoking Units by Landlord
- 8.28.060 Smoking and Smoke Generally
- 8.28.070 Other Requirements and Prohibitions
- 8.28.080 Penalties and Enforcement
- 8.28.090 Other Laws
- 8.28.100 Statutory Construction and Severability

Section 8.28.010 DEFINITIONS.

The following words and phrases, whenever used in this chapter, 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 are entitled to enter or use, including, for example, halls, pathways, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, grassy or landscaped areas, restrooms, laundry rooms, cooking areas, and eating areas.
- C. "Dining Area" means any area, including streets and sidewalks, which is available to or customarily used by the general public or an Employee, and that is designed, established, or regularly used for consuming food or drink.
- D. "Electronic Smoking Device" means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. "Electronic Smoking Device" includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

- E. "Employee" means any Person who is employed or retained as an independent contractor by any Employer in consideration for direct or indirect monetary wages or profit, or any Person who volunteers his or her services for an Employer.
- F. "Employer" means any Business or Nonprofit Entity that retains the service of one or more Employees.
- G. "Enclosed Area" means 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 boundaries of any height, whether or not those boundaries include vents or other openings; or
 2. Four walls or other vertical boundaries, including but not limited to, vegetation that exceeds six feet in height, whether or not those boundaries include vents or other openings.
- H. "Landlord" means any Person or agent of a Person who owns, manages, or is otherwise legally responsible for a Unit in a Multi-Unit Residence that is leased to a residential tenant, except that Landlord does not include a tenant who sublets a Unit (e.g., a sublessor).
- I. "Multi-Unit Residence" means property containing two (2) or more Units, including, but not limited to, apartment buildings, condominium complexes, senior and assisted living facilities, long-term health care facilities, hotels and motels, mobile home parks, and campgrounds. Multi-Unit Residences do not include the following:
1. A single-family home, except if used as a child care or health care facility subject to licensing requirements; and
 2. A single-family home with a detached or attached in-law or second Unit when permitted pursuant to Cal. Gov't Code §§ 65852.1, 65852.150, 65852.2 or an ordinance of the city adopted pursuant to those sections, except if the single-family home or in-law/second Unit is used as a child care or health care facility subject to licensing requirements.
- J. "Nonprofit Entity" means any entity that meets the requirements of California Corporations Code § 5003 as well as any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, political, social or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A government agency is not a Nonprofit Entity within the meaning of this chapter.
- K. "Person" means any natural person, Employer, cooperative association, personal representative, receiver, trustee, assignee, or any other legal entity including government agencies.
- L. "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 including, for example, indoor and outdoor work areas, construction sites, vehicles used in employment or for business purposes, taxis, hookah bars, retail tobacco shops, and private residences that are used as child care or health care facilities subject to licensing requirements.

- M. "Public Place" means any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement.
- N. "Reasonable Distance" means a distance of thirty (30) feet in any direction from an area in which Smoking is prohibited.
- O. "Recreational Area" means any area, including streets and sidewalks, 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, picnic areas, playgrounds, sports fields, golf courses, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, roller- and ice-skating rinks, skateboard parks, and amusement parks.
- P. "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 information kiosks, automatic teller machines (ATMs), ticket lines, bus stops or shelters, mobile vendor lines or cab stands.
- Q. "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 by-products, except when the combusting or vaporizing material contains no tobacco or nicotine *and* the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term Smoke includes, but is not limited to, tobacco smoke, Electronic Smoking Device vapors, marijuana smoke, and crack cocaine smoke.
- R. "Smoking" means engaging in an act that generates Smoke, such as, for example, inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, Electronic Smoking Device, or any plant product intended for human inhalation.
- S. "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.
- T. "Unenclosed Area" means any area that is not an Enclosed Area.
- U. "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.

Section 8.28.020 PROHIBITION OF SMOKING IN ENCLOSED AREAS.

A. Smoking is prohibited in the Enclosed Areas of the following places within the city:

1. Places of Employment;
2. Other Businesses that have a common or shared air space with an Enclosed Area in which Smoking is prohibited by law, such as, without limitation, openings, cracks, air ventilation systems, doorways, hallways, and stairways. Notwithstanding any other provision, the fact that Smoke enters one Enclosed Area from another Enclosed Area is conclusive proof that the areas share a common or shared air space;
3. Public Places; and
4. Common Areas of Multi-Unit Residences.

Section 8.28.030 PROHIBITION OF SMOKING IN UNENCLOSED AREAS.

A. Smoking is prohibited in the Unenclosed Areas of the following places within the city:

1. Recreational Areas;
2. Service Areas;
3. Dining Areas;
4. Places of Employment;
5. Common Areas of Multi-Unit Residences, provided 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 by 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. A Person with legal control over a Common Area in which a Smoking area has been designated shall modify, relocate or eliminate that designated Smoking area so as to maintain compliance with the requirements of this division 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 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;
- 6. All exclusive-use Unenclosed Areas associated with a Multi-Unit Residence, such as, for example, a private balcony, porch, deck, or patio;
 - 7. Other Public Places, when being used for a public event, including a farmers' market, parade, craft fair, festival, or any other event open to the general public.
- 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 City Manager or his or her designee shall engage in an ongoing educational program to explain and clarify the purposes and requirements of this chapter, as well as providing guidance to Persons, Landlords, Employers, and Nonprofit Entities about compliance. However, lack of such education shall not be a defense to a violation of this chapter.

Section 8.28.040 REASONABLE SMOKING DISTANCE REQUIRED.

- A. Smoking in all Unenclosed Areas shall be prohibited within a Reasonable Distance from any doorway, window, opening, crack, or vent into an Enclosed Area in which Smoking is prohibited, except while actively passing on the way to another destination and provided Smoke does not enter any Enclosed area in which Smoking is prohibited.
- B. Smoking in Unenclosed Areas shall be prohibited within a Reasonable Distance from any Unenclosed Areas in which Smoking is prohibited under § 8.28.030, except while actively passing on the way to another destination, and provided Smoke does not enter any Unenclosed Area in which Smoking is prohibited.

Section 8.28.050 DISCLOSURE OF NONSMOKING UNITS BY LANDLORD.

A Landlord of a Multi-Unit Residence with fewer than 100% nonsmoking units shall disclose to every prospective tenant, prior to entering into a new lease or other rental agreement for the occupancy of a Unit, which Units are designated nonsmoking units, a diagram depicting the location of the designated nonsmoking units in relation to all other Units, and any designated Smoking areas.

Section 8.28.060 SMOKING AND SMOKE GENERALLY.

- A. The provisions of this chapter are restrictive only and establish no new rights for a Person who engages in Smoking.
- B. Notwithstanding (i) any provision of this chapter or other provisions of this code, (ii) any failure by any Person to restrict Smoking under this chapter, or (iii) any explicit or implicit provision of this code that allows Smoking in any place, nothing in this code shall be interpreted to limit any Person's legal rights under other laws with regard to Smoking, including, for example, rights in nuisance, trespass, property damage, and personal injury or other legal or equitable principles.
- C. For all purposes within the jurisdiction of the city, non-consensual exposure to Smoke is a nuisance, and the uninvited presence of Smoke on property is a nuisance and a trespass.

Section 8.28.070 OTHER REQUIREMENTS AND PROHIBITIONS.

- A. No Person, Landlord, Employer, or Nonprofit Entity shall knowingly permit Smoking in an area which is under the legal or de facto control of that Person, Landlord, Employer or Nonprofit Entity and in which Smoking is prohibited by law.
- B. No Person, Landlord, Employer, 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, Landlord, Employer or Nonprofit Entity and in which Smoking is prohibited by law, including, without limitation, within a Reasonable Distance required by this chapter from any area in which Smoking is prohibited. Notwithstanding the foregoing, the presence of ash receptacles in violation of this division (B.) shall not be a defense to a charge of Smoking 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 is prohibited, including inside the perimeter of any Reasonable Distance required by this chapter.
- D. A Person, Landlord, Employer, or Nonprofit Entity that has legal or de facto control of an Enclosed or 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). Signs posted on the exterior of buildings to comply with this section shall include the Reasonable Distance requirement set forth in § 8.28.040. For purposes of this section, the City Manager or his or her designee shall be responsible for the posting of signs in regulated facilities owned or leased in whole or in part 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.
- E. No Person, Landlord, 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.

- F. 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.

Section 8.28.080 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 punishable pursuant to § 1.08.010 of this code. Other violations of this chapter may, in the discretion of the City Manager or his designee, 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. In addition, any peace officer or code enforcement official also may enforce this chapter.
- C. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.
- D. Any violation of this chapter is hereby declared to be a nuisance.
- E. 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, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.
- F. 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.

Section 8.28.090 OTHER LAWS.

It is not the intention of this chapter to regulate any conduct where the regulation of such conduct has been preempted by the State of California.

Section 8.28.100 STATUTORY CONSTRUCTION AND SEVERABILITY.

It is the intent of the City Council to supplement applicable state and federal law and not to duplicate or contradict such law, and this chapter shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this chapter, 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 chapter, or its application to any other person or circumstance. The City Council 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.

SECTION 3: CONFLICTS

All city policies, ordinances, and parts of ordinances in conflict herewith are hereby repealed.

SECTION 4: EFFECTIVE DATE

This ordinance shall become effective thirty (30) days after its adoption.

INTRODUCED AND FIRST READING PERFORMED on the 7th day of March 2016, by the following vote:

AYES: Council Member Gardner, Strehl, Mayor Pro Tem Trent, Mayor Long
NOES: None
ABSENT: Council Member Brown
ABSTAIN: None

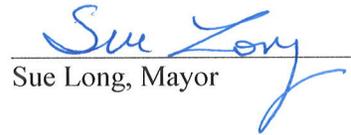

Sue Long, Mayor

ATTEST:


Linda McGill CMC, City Clerk

SECOND READING PERFORMED AND ADOPTED on the 21st day of March 2016, by the following vote:

AYES: Council Member Gardner, Strehl, Mayor Pro Tem Trent, Mayor Long
NOES: None
ABSENT: Council Member Brown
ABSTAIN: None


Sue Long, Mayor

ATTEST:


Linda McGill CMC, City Clerk

Approved As To Form:


David Tranberg, City Attorney

CERTIFICATE

I, Linda McGill, City Clerk of the City of Fortuna, do hereby certify that Ordinance 2016-720 was INTRODUCED at a regular meeting of the Fortuna City Council held the 7th day of March 2016, and was thereafter PASSED, ADOPTED AND ORDERED TO PRINT at a regular meeting of the Fortuna City Council held the 21st day of March 2016. I further certify that Ordinance 2016-720 was duly posted and published pursuant to law and the Charter of the City of Fortuna and is a true and correct copy.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City of Fortuna, California, and this 4th day of April 2016.


Linda McGill, CMC
City Clerk, City of Fortuna