

ORDINANCE NO. 19-02

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF FIREBAUGH AMENDING (1) CHAPTER 3, ARTICLE 12 RELATED TO THE USE, SALE, AND DISTRIBUTION OF TOBACCO PRODUCTS AND TO ADDRESS SMOKING IN MULTI-UNIT HOUSING, AND (2) CHAPTER 4, ARTICLE 5 RELATED TO TOBACCO RETAILERS TO CONFORM DEFINITIONS TO STATE LAW CHANGES

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health threat;

WHEREAS, experts have recognized that secondhand smoke is a serious health hazard that causes death and disease;

WHEREAS, secondhand aerosol emitted from electronic smoking devices (vaporizers) has been identified as a health hazard;

WHEREAS, secondhand cannabis smoke has also been identified as a health hazard and poses a serious public safety risk for those – including children – who may not realize they are inhaling secondhand cannabis smoke;

WHEREAS, nonsmokers who live in multi-unit residences can unwittingly be exposed to neighbors' secondhand smoke and are, therefore, unable to protect themselves from its effects;

WHEREAS, harmful residues from tobacco and cannabis smoke can be absorbed by and cling to virtually all indoor surfaces long after smoking has stopped and can then be emitted back into the air, making this "third-hand smoke" a potential health hazard;

WHEREAS, smoking is a leading cause of fire deaths and fire-related injury;

WHEREAS, the Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure;

WHEREAS, studies have confirmed that smoke-free multi-unit residence policies are the most effective method to fully reduce secondhand smoke exposure in multi-unit housing;

WHEREAS, approximately 11.8 million Californians (32 percent) live in multi-unit residences, which accounts for one-seventh of the total multi-unit housing population in the country;

WHEREAS, up to 46 percent of Californians living in multi-unit residences with personal smoke-free home policies are exposed to secondhand smoke in their homes;

WHEREAS, surveys have found that up to 90 percent of multi-unit residents who experience secondhand smoke in their homes are bothered by that incursion;

WHEREAS, secondhand smoke in multi-unit residences is a significant threat to the health and safety of California children;

WHEREAS, there are significant savings to nonsmokers, multi-unit residence property owners, the healthcare system, and private and government employers from adopting a City-wide, smoke-free multi-unit residences policy;

WHEREAS, a local ordinance that requires residential rental agreements to include a smoking prohibition within rental units is not prohibited by California law;

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, triggers local police powers and is a nuisance; and

WHEREAS, local governments have broad latitude to define and declare nuisances and are not constrained by prior definitions of “nuisance.”

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF FIREBAUGH DOES ORDAIN AS FOLLOWS:

Section 1: Chapter 3, Article 12 of the Firebaugh Municipal Code is amended as follows:

Sec. 3-12.1 Definitions.

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

- a. “Adjacent Unenclosed Property” shall mean any unenclosed area of property, publicly or privately owned, that abuts a Multi-Unit Residence, but does not include property containing detached single-family homes.
- b. “Cannabis” shall mean the same as defined in Health and Safety Code Section 11018, as all parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include either of the following:
 - 1. Industrial hemp, as defined in Section 11018.5; or
 - 2. The weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink, or other product.
- c. “City Property” shall mean property owned by the City of Firebaugh, whether indoors or outdoors, including but not limited to, city-owned buildings, parks, playgrounds, plazas, streets, and sidewalks.
- d. “Common Area” shall mean every Enclosed Area and every Unenclosed Area in a Multi- Unit Residence that residents of more than one Unit are entitled to enter or use, including, without limitation, 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.
- e. “Electronic Smoking Device” shall mean 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 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 that serves the same purpose.
- f. “Enclosed Area” shall mean an area in which outside air cannot circulate freely to all parts, including an area that has:
 - 1. Any type of overhead cover and at least three (3) walls or other physical boundaries of any height; or
 - 2. Four (4) walls or other vertical boundaries that exceed six (6) feet in height.
- g. “Existing Unit” shall mean a Unit that is not a New Unit.
- h. “Landlord” shall mean 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” shall mean property containing two (2) or more Units, including, but not limited to, duplexes, apartment buildings, condominium complexes, senior and assisted living facilities, and long-term healthcare facilities. “Multi-Unit Residence” does not include the following:

1. a hotel or motel that meets the requirements of California Civil Code Section 1940, subdivision (b)(2);
 2. a mobile home park;
 3. a campground;
 4. a marina or port;
 5. a single-family home, except if used as a child-care or healthcare facility subject to licensing requirements; or
 6. a single-family home with a detached or attached in-law or second unit permitted pursuant to California Government Code Sections 65852.1, 65852.2 or Chapter 25 of the City's zoning ordinance, except if the single-family home or in-law/second unit is used as a child-care or healthcare facility subject to licensing requirements.
- j. "New Unit" shall mean a Unit that is issued a certificate of occupancy after July 1, 2019.
- k. "Non-sale distribution" shall mean to give a tobacco product to a member of the general public or a consumer at no cost or at nominal cost; or to give proxies for tobacco products such as coupons, coupon offers, or rebate offers for a tobacco product to a member of the general public or a consumer at no cost or at nominal cost. Distribution of tobacco products, coupons, coupon offers, or rebate offers in connection with the full value bona fide sale of a tobacco product shall not constitute non-sale distribution.
- l. "Nonsmoking Area" shall mean any Enclosed Area or Unenclosed Area in which Smoking is prohibited by:
1. this article or other law;
 2. a binding agreement relating to the ownership, occupancy, or use of real property; or
 3. a designated Person with legal control over the area.
- m. "Person" shall mean any natural person, partnership, cooperative association, Private Corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- n. "Smoke" shall mean the gases, particles, or vapors released into the air as a result of combustion, electrical ignition, or vaporization when the apparent or usual purpose of the combustion, electrical ignition, or vaporization is human inhalation of the byproducts, except when the combusting 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, cannabis smoke, and smoke released into the air by combustion, electrical ignition, or vaporization of any illegal drugs.
- o. "Smoke-Free Residence" shall mean a Multi-Unit Residence that complies with the requirements of this Article as of July 1, 2019.
- p. "Smoking" shall mean 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.
- q. "Tobacco Paraphernalia" shall mean any item designed or marketed for the consumption, use, or preparation of Tobacco Products.
- r. "Tobacco Product" shall mean: (1) any product containing, made or derived from tobacco for 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, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body;; and (3) any electronic device that delivers nicotine or other substances to the Person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah. "Tobacco Product" does not include any product specifically 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.
- s. "Unenclosed Area" shall mean any area that is not an Enclosed Area.

- t. "Unit" shall mean 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, without limitation, an apartment; a condominium; a townhouse; a room in a senior facility; a room in a long-term health care facility, assisted living facility, or hospital; a room in a hotel or motel; a dormitory 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. "Unit" includes, without limitation, a New Unit.

3-12.2 Tobacco Product Use Prohibited on City Property.

- a. No person shall smoke or use a tobacco product on city property, except on city-owned streets open to normal traffic and on adjacent sidewalks. When city-owned streets and adjacent sidewalks are used for events including, but not limited to, a farmers' market or parade, smoking and tobacco product use is prohibited on such streets and sidewalks during the event, including set-up and tear-down.
- b. "No Smoking" signs, with letters of no less than one (1) inch in height or 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) shall be clearly, sufficiently and conspicuously posted by the city manager or his or her designee on city property where smoking and tobacco products are prohibited by this chapter. Signage must include the city phone number where complaints can be directed. Notwithstanding this provision, the presence or absence of signs shall not be a defense to the violation of any provision of this Article 3-12.
- c. No person shall dispose of smoking waste or tobacco-product waste on city property on which smoking or tobacco product use is prohibited, except in a designated waste disposal container.
- d. Consistent with Health and Safety Code section 11362.3, subdivisions (a)(1) and (2), no person shall smoke or ingest cannabis in any public place within the city nor shall they Smoke cannabis anywhere Smoking tobacco is prohibited.

3-12.3 Tobacco Product Sale and Distribution Prohibited on City Property.

- a. No person shall sell, offer for sale, or exchange, or offer to exchange for any form of consideration tobacco products on city property.
- b. No person shall engage in the non-sale distribution of any tobacco product on city property.

3-12.4 Smoking and Smoke Generally.

- a. The provisions of this Article are restrictive only and establish no new rights for a Person who engages in Smoking. Notwithstanding (1) any provision of this Article or of this Code, (2) any failure by any Person to restrict Smoking under this Article, or (3) 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, personal injury or other legal or equitable principles.
- b. Nonconsensual exposure to Smoke occurring on or drifting into residential property is a nuisance, and the uninvited presence of Smoke on residential property is a nuisance and a trespass.

3-12.5 Smoking Restrictions in All Units of Multi-Unit Residences.

- a. Smoking is prohibited in all Units in a Multi-Unit Residence, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio. Smoking in any Unit in a Multi-Unit Residence, on or after July 1, 2019 is a violation of this Article.
- b. No Smoking shall be permitted in Common Areas of Multi-Unit Residences except in designated Smoking areas.

1. Smoking in a Common Area on or after July 1, 2019, other than in a designated Smoking area established pursuant to paragraph 2 below, is a violation of this Article.
2. A Person with legal control over a Common Area, such as, for example, a Landlord or homeowners' association may designate a portion of the Common Area as a Smoking area provided the designated Smoking area complies with paragraph 3 below at all times.
3. A designated Smoking area:
 - A. Must be an Unenclosed Area;
 - B. Must be at least twenty-five (25) feet from Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity, including, for example, playgrounds, tennis courts, swimming pools, and school campuses;
 - C. Must be located at least twenty-five (25) feet from any Nonsmoking Area. The location of Nonsmoking Areas may change due to the new enactment of a law, execution of an agreement, or other event that affects the area's Smoking designation. If an event occurs that changes a Nonsmoking Area, a Person with legal control over a designated Smoking area within less than twenty-five (25) feet of that Nonsmoking Area must modify, relocate, or eliminate that designated Smoking area so as to maintain compliance with the requirements of subsection B above. In the case of a Nonsmoking Area on a neighboring property established only by private agreement or designation and not by this article or other law, it shall not be a violation of this Article for a Person with legal control to designate a Smoking area within twenty-five (25) feet of the Nonsmoking Area unless they have actual knowledge of, or a reasonable person would know of, the private agreement or designation. It shall not be a violation of this Article for a Person to Smoke within a Nonsmoking Area if the area is erroneously designated as a Smoking area unless a reasonable person would know of the error;
 - D. Must be no more than ten percent (10%) of the total Unenclosed Area of the Multi-Unit Residence for which it is designated;
 - E. Must have a clearly marked perimeter;
 - F. Must be identified by conspicuous signs; and
 - G. Must not overlap any Enclosed or Unenclosed Area where Smoking is prohibited by this Article or other law.
4. No Person with legal control over a Common Area in which Smoking is prohibited by this Article or other law shall knowingly permit the presence of ash trays, ash cans, or other receptacles designed for, or primarily used for, disposal of Smoking waste within a Common Area in which Smoking is prohibited by this Article or other law.

- c. Non-Smoking Buffer Zones. Smoking is prohibited in Adjacent Unenclosed Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area in a Multi-Unit Residence.
- d. No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area.

3-12.6 Required and Implied Lease Terms for All New and Existing Units in Multi-Unit Residences.

- a. Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month after July 1, 2019 shall include the provisions set forth in paragraph (b) below on the earliest possible date when such an amendment is allowable by law with the minimum legal notice.
- b. Every lease or other rental agreement for the occupancy of a New Unit in a Multi-Unit Residence entered into, or in the case of an Existing Unit, entered into, amended, renewed or continued month-to-month, after July 1, 2019, shall include the following provisions:
 1. A clause providing that Smoking is prohibited in the New Unit, including exclusive-use areas such as balconies, porches, or patios, and in any Common Area other than a designated Smoking area; and

2. A clause expressly conveying third-party-beneficiary status to all occupants of the Multi-Unit Residence solely against the violator(s) of the Smoking provisions of the lease or other rental agreement.
- c. Regardless of whether a Landlord complies with paragraph (b) above, the clauses required by that paragraph shall be implied and incorporated by law into every agreement to which paragraph applies and shall become effective as of the earliest possible date on which the Landlord could have made the insertions pursuant to paragraph (b).
- d. A tenant who breaches a Smoking provision of a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, or who knowingly permits any other Person subject to the control of the tenant or present by invitation or permission of the tenant, shall be liable for the breach to (1) the Landlord and (2) any occupant of the Multi-Unit Residence who is exposed to Smoke or who suffers damages as a result of the breach.
- e. This Article shall not create additional liability for a Landlord to any Person for a tenant's breach of any Smoking provision in a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence if the Landlord has fully complied with this Article.
- f. Failure to enforce any Smoking provision required by this Article 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.

3-12.7 Notice Requirements and Prohibitions.

a. Rental Units:

As of July 1, 2019, every Landlord of a Unit in a Multi-Unit Residence shall provide existing and prospective tenants with written notice clearly stating:

1. Smoking is prohibited in all Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of July 1, 2019; and
2. Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of July 1, 2019.

b. Unit Sales:

As of July 1, 2019, every seller of a Unit in a Multi-Unit Residence shall provide prospective buyers with written notice clearly stating:

1. All Units are designated Nonsmoking Units and Smoking shall be illegal in all Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of July 1, 2019; and
2. Smoking in all Common Areas, except for specifically designated Smoking areas, will be a violation of this Article as of July 1, 2019.

- c. Smoke-Free Residences are exempt from the noticing requirements of subsections (a) and (b) above.
- d. Clear and unambiguous "No Smoking" signs shall be posted in sufficient numbers and locations in Common Areas where Smoking is prohibited by this Article or other law. In addition, signs shall be posted in sufficient numbers and locations in the Multi-Unit Residence to indicate that Smoking is prohibited in all Units. Such signs shall be maintained by the Person or Persons with legal control over the Common Areas. The absence of signs shall not be a defense to a violation of any provision of this Article. "No Smoking" signs are not required inside or on doorways of Units.

3-12.8 Prohibitions Apply to Cannabis.

California Health and Safety Code Sections 11362.3(a) (2) and 11362.79(a), as may be amended or renumbered from time to time, prohibit Smoking cannabis wherever Smoking tobacco is prohibited. The prohibitions on Smoking in Multi-Unit Residences found in this Article expressly apply to the Smoking of cannabis.

3-12.9 Penalties and Enforcement.

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

- a. Violations of this Article are subjected to a civil action brought by the district attorney or the city attorney, and are punishable by:
 - 1. A fine of not less than one hundred dollars (\$100.00) and not exceeding two hundred fifty dollars (\$250.00) for a first violation in any sixty (60)-month period; or
 - 2. A fine of not less than two hundred fifty dollars (\$250.00) and not exceeding five hundred dollars (\$500.00) for a second violation in any sixty (60)-month period; or
 - 3. A fine of not less than five hundred dollars (\$500.00) and not exceeding one thousand dollars (\$1,000.00) for a third or subsequent violation in any sixty (60)-month period.
- b. Violations of any provision of this Article are infractions. Enforcement of the penal provision of this Article shall be implemented by the city manager or his designee. Any peace officer or code enforcement officials also may enforce this Article.
- c. No person shall intimidate, harass, or otherwise retaliate against any person who seeks to attain compliance with this Article. Moreover, no person shall intentionally or recklessly expose another person to secondhand smoke in response to that person's effort to achieve compliance with this section. A violation of this section constitutes a misdemeanor.
- d. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Article shall constitute an infraction.
- e. A violation of this Article is hereby declared to be a public nuisance.
- f. In addition to other remedies provided by this Article or otherwise available at law or in equity, any violation of this Article 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.

Sec. 3-12.10 Severability.

It is the intent of the City Council of the City of Firebaugh to supplement applicable State and federal law and not to duplicate or contradict such law, and this Article shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this Article, 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 Article, or its application to any other Person or circumstance. The City Council of the City of Firebaugh hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof independently, irrespective of the fact that one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases hereof may be declared invalid or unenforceable.

Section 2: The following subsections of Article 4-5 of the Firebaugh Municipal Code relating to Tobacco Retailers are hereby amended to read as follows:

* * *

4-5.3 Definitions.

- g. "Tobacco paraphernalia" shall mean any item designed or marketed for the consumption, use, or preparation of Tobacco Products, including, but not limited to, cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.
- h. "Tobacco Product" shall mean: (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, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body; and (3) any electronic device that delivers nicotine or other substances to the Person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah. "Tobacco Product" does not include any product specifically 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.

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Section 3: This ordinance shall take effect thirty (30) days after its adoption.

Section 4: The City Clerk is authorized and directed to cause this ordinance to be codified after its adoption.

Section 5: The City Clerk is further authorized and directed to cause this ordinance, or a summary of this ordinance, to be published once in a newspaper of general circulation published and circulated in the City of Firebaugh within fifteen (15) days after its adoption. If a summary of this ordinance is published, then the City Clerk also shall cause a summary of the proposed ordinance to be published and a certified copy of the full text of the proposed ordinance to be posted in the Office of the City Clerk at least five (5) days prior to the Council's meeting at which the ordinance is to be adopted and again after the meeting at which the ordinance is adopted. The City Attorney shall approve the summary.

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The foregoing Ordinance No. 19-02 was introduced at a regular meeting of the City Council of the City of Firebaugh on the 6th day of May, 2019, and was passed and adopted at a regular meeting of the City Council on the 20th day of May, 2019, by the following vote:

YES: Valdez, Perez, Lopez, Sablan
NOES: Jenkins
ABSTAIN:
ABSENT:

APPROVED:



Marcia Sablan, Mayor
City of Firebaugh

ATTEST:



Rita Lozano, Deputy City Clerk
City of Firebaugh