

**PLEASE NOTE:**

This copy of Ordinance No. 227.7 is a “redlined” version for your convenience. Text additions are designated by an underline and text deletions are designated with a strikethrough.

**REGULAR**

**Number:** 227.7

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS TO AMEND TITLE V, CHAPTER 215, TO REGULATE SMOKING AND TOBACCO PRODUCT USE IN OUTDOOR PLACES**

**HISTORY:** This Ordinance was introduced (first reading) by the City Council at its meeting of \_\_\_\_\_, upon motion by \_\_\_\_\_, and was adopted (second reading) by the City Council at its meeting of \_\_\_\_\_, upon motion by \_\_\_\_\_. Said Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

\_\_\_\_\_  
Mary Lavelle, City Clerk

\_\_\_\_\_  
Jose S. Esteves, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
Christopher J. Diaz, City Attorney

**RECITALS AND FINDINGS:**

**WHEREAS**, the City of Milpitas, California (the “City”) is a municipal corporation, duly organized under the constitution and laws of the State of California; and

**WHEREAS**, tobaccos use causes death and disease and continues to be an urgent challenge; and

**WHEREAS**, exposure to secondhand smoke anywhere has negative health impacts, and exposure to second hand smoke occurs at significant levels outdoors; and

**WHEREAS**, smokeless tobacco is not a safe alternative to smoking and causes its own share of death and disease; 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**, cigarette butts pose a health threat to young children, as seen by American poison control centers receiving nearly 8,000 reports of children poisoned by the ingestion of cigarettes, cigarette butts, and other tobacco products in 2009; and

**WHEREAS**, in 2006, the California Air Resources Board classified secondhand smoke as a “Toxic Air Contaminant”; and

**WHEREAS**, the United States Surgeon General reports that there is no safe level of exposure to secondhand smoke; and

**WHEREAS**, California Health and Safety Code section 118910 provides authority for the City to completely ban the smoking of tobacco or otherwise regulate it to preserve the public health, safety, and welfare; and

**WHEREAS**, this Ordinance was found to be categorically exempt from environmental review per the provisions of Section 15061(b)(3) of the California Environmental Quality Act of 1970, as amended; and

**WHEREAS**, it is the intent of the City Council, in enacting this Ordinance, to provide for the public health, safety, and welfare, by discouraging the inherently dangerous behavior of smoking around non-tobacco users, by protecting the public from secondhand smoke where they eat; and by affirming and promoting a healthy environment in and around dining areas.

**NOW, THEREFORE**, the City Council of the City of Milpitas does ordain as follows:

**SECTION 1. RECORD AND BASIS FOR ACTION**

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

## SECTION 2. AMENDMENT OF MILPITAS MUNICIPAL CODE, TITLE V, CHAPTER 215

Chapter 215, “Regulation of Smoking in Certain Places” of Title V of the Milpitas Municipal Code is hereby amended as follows:

### Chapter 215 – REGULATION OF SMOKING IN CERTAIN PLACES

#### Sections:

V-215-1.10	Purpose
V-215-1.15	Definitions
V-215-1.20	<del>Prohibition on Smoking in City-Owned Facilities</del> <u>Smoking Prohibited</u>
V-215-1.25	<del>Prohibition on Smoking in Certain Places</del>
<del>V-215-1.29</del>	<del>Smoking—Optional Areas</del>
V-215-1.30	Posting of Signs
V-215-1.40	Inspection
V-215-1.50	Penalty

#### V-215-1.10- Purpose

The City Council of the City of Milpitas recognizes the right and need of those who wish to breathe fresh air while working, ~~or~~ engaging in play or athletic activity, or while dining. In order to serve the public health, safety and general welfare, the purpose of this Chapter is to prohibit ~~smoking in public playground areas, athletic facilities, and certain places of employment, except in designated smoking areas~~ the areas defined herein with some exceptions. The City Council hereby adopts and incorporates as if set out at length herein, California Labor Code Section 6404.5, and California Health and Safety Code Section 104495, as now written and as amended from time to time. A copy of California Labor Code Section 6404.5 and California Health and Safety Code, Section 104495, shall be available for inspection during regular business hours in the office of the City Clerk.

#### V-215-1.15- Definitions

This ~~Section~~ Chapter is hereby enacted to include the following definitions:

(a) “Electronic Smoking Device” shall mean an electronic and/or battery-operated device, the use of which may resemble smoking that can be used to deliver an inhaled dose of nicotine or other substances. Electronic Smoking Device includes but is not limited to 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.

(b) “Outdoor Dining Area” shall mean any privately owned or publicly owned area, street, or sidewalk, which is available or customarily used by the general public and which is designed, established, or regularly used for consuming food or drink.

(c) “Public facility” shall mean any building owned or leased by the City of Milpitas, including city vehicles.

(d) “Reasonable Distance” shall mean a distance of 25 feet in any direction from an area in which smoking is prohibited.

(e) “Recreational area” shall mean any outdoor area, including streets and sidewalks adjacent to Recreational areas, owned or operated by the City of Milpitas 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, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, skateboard parks, and bleacher areas, spectator seating areas, concession stands, parking lots or other areas designated or primarily used for parking vehicles of persons accessing a Recreational Area.

(f) “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. The term Smoke includes, but is not limited to tobacco smoke, Electronic Smoking Device vapors, and marijuana smoke.

(g) “Smoking” shall mean engaging in an act that generates Smoke, including but not limited to igniting, lighting or possession of a lighted pipe, cigar, hookah water pipe, cigarette of any kind, an operating Electronic Smoking Device or lighted smoke inhalation device of any kind that generates Smoke of any kind.

~~(e) Electronic Smoking Device shall mean an electronic and/or battery operated device, the use of which may resemble smoking that can be used to deliver an inhaled dose of nicotine or other substances. Electronic Smoking Device includes but is not limited to 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~~  
(g) Public park shall mean any area owned, operated and maintained by the City of Milpitas that is set aside and maintained for park and public recreation us

**V-215-1.20 – Prohibition of Smoking in City-Owned Facilities**

~~Smoking shall be prohibited within 25 feet of entrances, exits, open windows, and ventilation intake systems of any building owned or leased by the City of Milpitas, including City vehicles.~~

(a) Smoking is Prohibited

1. Within a Reasonable Distance of entrances, exits, open windows, and ventilation intake systems of any Public facility;

2. In Recreational Areas;

3. In Outdoor Dining Areas; and

(b) Reasonable Distance Required for Smoking

1. Smoking in all unenclosed areas is prohibited within a reasonable distance from any unenclosed areas in which smoking is prohibited under V-215-1.20.(a)

2. The smoking prohibitions in Section V-215-1.20.(b)(1) shall not apply to unenclosed areas on private residential properties.

(c) Nothing in this Chapter shall be construed to prohibit smoking in any area in which such smoking is already prohibited by state or federal law unless the applicable state or federal law does not preempt additional local regulation.

(d) No person shall dispose of used smoking waste within the boundaries of an area in which smoking is prohibited by this Chapter.

### ~~V-215-1.25 — Prohibition of Smoking in Certain Places~~

~~Except as specified in Section V-215-1.29 Smoking—Optional Areas, smoking shall be prohibited in the following places within the City of Milpitas:~~

~~\_\_\_\_\_ (a) Within 25 feet of all playgrounds owned and operated by the City of Milpitas.~~

~~\_\_\_\_\_ (b) Within 25 feet of any sports facility owned by the City of Milpitas, including bleacher areas, spectator seating areas, and concession stands.~~

~~\_\_\_\_\_ (c) All public parks owned and operated by the City of Milpitas~~

### **V-215-1.259 – Smoking—Optional Areas**

Notwithstanding any other provisions of this Chapter to the contrary, the following areas shall not be subject to the smoking restrictions of this Chapter:

(a) On-stage smoking as part of a stage production, or similar exhibition in a public facility.

~~(b) A public sidewalk within 25 feet of a public facility, playground or sports facility.~~

~~(be) Any public area not restricted to smoking where smoking is permitted or is not otherwise prohibited by this Chapter.~~

~~(cd) Private property, except where such property meets the definition of Outdoor Dining Area.~~

### **V-215-1.30 – Posting of Signs**

"Smoking" or "No Smoking" signs, whichever are appropriate, with letters of not less than one inch (1") 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 in or outside of every building or other place where smoking is controlled by this Chapter, by the owner, operator, manager, or other person having control of such building or other place. When a sign is posed on the exterior of a building to indicate "No Smoking," it shall include the distance limitations contained in this Chapter. Notwithstanding this provision, the presence or absence of signs shall not be a defense to a charge of smoking in violation of any provision of this Chapter.

### **V-215-1.40 – Inspection**

The City Manager, or his or her designee(s), shall have the authority to enforce provisions of this Chapter. Such enforcement shall include the right to enter places of employment or any playground or sports facility, as defined in California Labor Code Section 6404.5, and California Health and Safety Code, Section 104495, at any time a City owned and/or operated facility is open to the public, or during regular business hours for the purpose of making reasonable inspections to observe and enforce compliance with this Chapter.

### **V-215-1.50 – Penalty**

Persons violating sections V-215-1.20 ~~and V-215-1.25~~ of this Chapter shall be guilty of an infraction punishable by a fine of two hundred fifty dollars (\$250) for each violation of this Section. Each instance of smoking in violation of this Chapter shall constitute a separate

violation. For violations other than smoking, each day of a continuing violation of this Chapter shall constitute a separate violation.

### **SECTION 3. CEQA**

This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The City Council further finds, under Title 14 of the California Code of Regulations, Section 15061(b)(3), that this Ordinance is nonetheless exempt from the requirements of CEQA in that the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. The City Council, therefore, directs that a Notice of Exemption be filed with the County Clerk of the County of Santa Clara in accordance with CEQA Guidelines.

### **SECTION 4. SEVERABILITY**

If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for any reason is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

### **SECTION 5. CUSTODIAN OF RECORDS**

The documents and materials that constitute the record of proceedings on which this Ordinance is based are located at the City Clerk’s office located at 455 East Calaveras Blvd., Milpitas, CA 95305. The custodian of these records is the City Clerk.

### **SECTION 6. RESTATEMENT OF EXISTING LAW**

Neither the adoption of this ordinance nor the repeal of any other ordinance of this City shall in any manner affect the prosecution for violations of ordinances, which violations were committed prior to the effective date hereof, nor be construed as a waiver of any license or penalty or the penal provisions applicable to any violation thereof. The provisions of this ordinance, insofar as they are substantially the same as ordinance provisions previously adopted by the City relating to the same subject matter or relating to the enumeration of permitted uses under the City’s zoning code, shall be construed as restatements and continuations, and not as new enactments.

### **SECTION 7. EFFECTIVE DATE AND POSTING**

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.