

City of Brisbane

Agenda Report

TO: Mayor Lentz and Members of the Brisbane City Council

FROM: Michael H. Roush, City Attorney

SUBJECT: **Adoption of Ordinance 611**, enacting Chapter 8.46 of the Brisbane Municipal Code to prohibit smoking of tobacco products in multi-unit residences

DATE: November 3, 2016

Recommendation: Adopt Ordinance 611

Background

On October 20, 2016, City Council, on a 3-2 vote, introduced Ordinance 611 that prohibits smoking of tobacco products in multi-unit residences. The Ordinance as introduced provides that its enforcement will be deferred for six months in order that property owners and tenants may become aware of the new regulations and take whatever action is necessary to comply with the Ordinance. The Ordinance (attached) is now before the Council for adoption.

Discussion

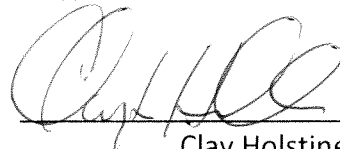
During the Council's discussion of the Ordinance, Council member asked what impact, if any, Proposition 64, the "Adult Use of Marijuana Act", on the November 8 ballot would have on the Ordinance, if Proposition 64 passes. The answer is none.

The purpose of the Act is to establish a comprehensive system to legalize, control, and regulate the cultivation, processing, manufacture, distribution, testing and sale of nonmedical marijuana for use by adults 21 years and older, and to tax the commercial growth and retail sale of marijuana. In relevant part, the Act does not permit (a) the smoking of marijuana in public places, (b) smoking marijuana in a location where smoking tobacco is prohibited or (c) smoking marijuana within 1000 feet of a school or day care center.

Accordingly, if smoking tobacco in a multi-unit residence is prohibited by Ordinance 611, smoking nonmedical marijuana would be similarly prohibited.



Michael H. Roush
City Attorney



Clay Holstine
City Manager

ORDINANCE NO. 611

AN ORDINANCE OF THE CITY OF BRISBANE ENACTING CHAPTER 8.46 OF THE BRISBANE MUNICIPAL CODE TO PROHIBIT SMOKING OF TOBACCO PRODUCTS AND OTHER PRODUCTS, INCLUDING USE OF ELECTRONIC CIGARETTES, IN MULTI-UNIT RESIDENCES.

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health threat, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States, accounting for about 443,000 deaths each year; and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth; and
- Some of the most common types of cancers, including stomach, liver, uterine, cervix, and kidney cancers, are related to tobacco use; and
- The FDA identifies 93 chemicals and chemical compounds found in tobacco products and tobacco smoke as a harmful or potentially harmful carcinogens, respiratory toxicants, cardiovascular toxicants and/or reproductive or developmental toxicants; and
- According to the Centers for Disease Control and Prevention, tobacco smoke contains “a deadly mix of more than 7,000 chemicals,” including hundreds of toxic chemicals such as formaldehyde, benzene, polonium 210, vinyl chloride, chromium, arsenic, lead, cadmium, carbon monoxide, hydrogen cyanide, ammonia, butane and toluene; and
- Nicotine is a highly addictive neurotoxin contained in tobacco, and is included in the Proposition 65 list of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity; and
- Nicotine is known to cause birth defects and is particularly dangerous for vulnerable populations including children, pregnant women and people with cardiovascular conditions; and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke; and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure; and
- The California Environmental Protection Agency included secondhand tobacco smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm; and

WHEREAS, exposure to secondhand tobacco smoke causes death and disease, as evidenced by the following:

- Since 1964, approximately 2,500,000 nonsmokers have died from health problems caused by exposure to secondhand smoke; and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent; and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year, and exacerbates childhood asthma; and

WHEREAS, tobacco use and exposure to secondhand tobacco smoke impose great economic costs, as evidenced by the following:

- Smoking-related illness in the United States costs more than \$300 billion each year, nearly \$170 billion of these costs are for direct medical care for adults, and more than \$156 billion of these costs are for lost productivity, including \$5.6 billion in lost productivity due to secondhand smoke exposure; and
- The total annual cost of smoking in California was estimated at \$487 per resident or \$4,603 per smoker per year, for a total of nearly \$18.1 billion in smoking-related costs in 2009 alone; and

- California's Tobacco Control Program saved the state and its residents \$134 billion in health care expenditures between the year of its inception, 1989, and 2008, with savings growing yearly; and

WHEREAS, smoking is the primary cause of fire-related injuries and deaths in the home, as evidenced by the following:

- Cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States, causing an estimated 90,000 smoking-related fires, 540 deaths, 1640 injuries, and \$621 million in direct property damage in 2011; and
- One in four fatalities from home fires caused by smoking is NOT the smoker whose cigarette started the fire, and 25% of those deaths were of neighbors or friends of the smoker; and
- Smoking in a residence where long-term oxygen therapy takes place is very dangerous as oxygen is a fire accelerant, and 27% of fatalities due to smoking during long-term oxygen therapy occurred in multi-family residences; and
- The United States Fire Administration recommends that if people smoke, they smoke outdoors; and

WHEREAS, nonsmokers who live in multi-unit residences can be exposed to neighbors' secondhand smoke, as evidenced by the following:

- Secondhand smoke can seep under doorways and through wall cracks; and
- Persons living in apartments near smokers can be exposed to elevated pollution levels for 24 hours a day, and at times, the particulate matter exposure can exceed the U.S. Environmental Protection Agency's 24-Hour Health Based Standard; and
- 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; and

WHEREAS, most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- Nearly 87% of Californians and 91% of California women are nonsmokers; and
- 74% of Californians surveyed approve of apartment complexes requiring at least half of rental units be nonsmoking; and
- 69% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings and 78% support laws that create nonsmoking units; and
- 62% of California renters feel that there is a need for laws to limit smoking in apartments; and
- In 2013, Breathe California, Youth Leadership Institute and the Sunset Tobacco Education Project conducted a sample survey with over 400 people in San Mateo County that showed that 100% of tenants believe secondhand smoke is harmful and 95% would be bothered by the smell of tobacco in their apartments. Residents throughout San Mateo County were overwhelmingly (75-79%) in support of smoke-free multi-unit housing policies; and

WHEREAS, a 2013 study concluded that persons within 2 meters of an active cigarette smoker will be exposed to elevated concentrations of particulate matter from secondhand smoke, whether the smoker is indoors or outdoors; and

WHEREAS, another 2013 study concluded that 9 meters is the minimum distance from an active cigarette smoker to prevent exposure to outdoor secondhand tobacco smoke; and

WHEREAS, according to the 2013 Community Health Assessment, there has been an increase in asthma among adults in San Mateo County from 8% in 1998 to 17.9% in 2013; and

WHEREAS, 11.4% of San Mateo County children under the age of 18 have been diagnosed with asthma; and

WHEREAS, asthma is one of the leading causes of absenteeism among school children, which can be easily prevented with proper prevention and management; and

WHEREAS, asthma attacks cause people with asthma and their family members to miss thousands of days at work each year; and

WHEREAS, the use of electronic smoking devices is a recent trend that is proliferating in California, including in Brisbane. Electronic smoking devices, commonly referred to as “e-cigarettes,” “e-cigars,” “e-cigarillos,” “e-pipes,” “e-hookahs,” are electronic devices often made to look like conventional tobacco products in shape, size and color; and

WHEREAS, electronic smoking devices are designed to be used in the same manner as conventional tobacco products with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

WHEREAS, a study published in the Journal of Environment and Public Health suggests that electronic smoking devices “may have the capacity to ‘re-normalize’ tobacco use in a demographic that has had significant de-normalization of tobacco use previously”; and

WHEREAS, although the long-term health effects of using electronic cigarettes are still unknown, initial studies have found carcinogens and toxic chemicals, including nicotine, in electronic cigarette aerosols:

- A recent scientific study confirmed that electronic smoking devices that contain nicotine also emit nicotine in the released vapor and involuntarily expose nonsmokers to nicotine; and
- The FDA 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
- A study published in the American Journal of Public Health found similar results to those identified in FDA testing and concluded that the electronic smoking devices tested demonstrated poor quality control, toxic contaminants, misrepresentation of the nicotine delivered and insufficient evidence of the overall public health benefit; and
- A recent study found a total of 22 elements in vapors produced by electronic smoking devices, and three of these elements (lead, nickel, and chromium) appear on the FDA’s “Harmful and Potentially Harmful Chemicals List”; and

- Recent studies show that the aerosol emitted by electronic cigarettes contains 10 chemicals listed on the Proposition 65 list of chemicals known to the state to cause cancer, birth defects and reproductive harm;" and
- Recent studies also show that the aerosol emitted by electronic cigarettes contains ultrafine particles that are inhaled and trapped in the lungs, absorbed by the blood stream and delivered to the brain and other organs; and

WHEREAS, manufacturers of electronic smoking devices have not submitted clinical studies about the safety and efficacy of these products to the FDA; and, therefore, consumers currently have no way of knowing what types or concentrations of potentially harmful chemicals they are inhaling and exhaling when they use these products; and

WHEREAS, the City is supportive of tobacco cessation programs and modalities that have proven efficacy and utilize safe FDA-approved products, but to date, electronic smoking devices are not an FDA-approved smoking cessation device; and

WHEREAS, the World Medical Association has determined that electronic smoking devices "are not comparable to scientifically-proven methods of smoking cessation" and that "neither their value as therapeutic aids for smoking cessation nor their safety as cigarette replacements is established; and

WHEREAS, a recent study suggests that electronic cigarettes are more often used by teens for experimentation rather than for smoking cessation; and

WHEREAS, the confusion caused by the visual similarity between electronic smoking devices and traditional tobacco products may impact individuals and the owners of establishments seeking to comply with applicable smoke-free laws and will threaten the City's enforcement of these laws; and

WHEREAS, the use of electronic smoking devices in smoke-free locations threatens to reverse the progress that has been made in establishing the social norm that smoking is not permissible in public places or places of employment; and

WHEREAS, the use of electronic smoking devices in smoke-free locations may increase the social acceptability and appeal of smoking, particularly for youth, undermining the progress that has been made over the years in discouraging smoking; and

WHEREAS, according to a recent study of adolescents who do not smoke conventional cigarettes, electronic cigarette use “is associated with a willingness to smoke, a predictor of future cigarette smoking;” and

WHEREAS, the recent increase in electronic cigarettes use is exposing the public to secondhand electronic cigarette vapors which have not been scientifically proven as safe; and

WHEREAS, prohibiting the use of electronic smoking devices in smoke-free locations will protect traditionally smoke-free locations such as daycare centers, schools, libraries, public parks, playgrounds and beaches and will prevent people, including children, from involuntarily inhaling nicotine and potentially harmful chemicals scientifically proven to exist in the secondhand vapor of electronic smoking devices; and

WHEREAS, 5 states currently ban the use of electronic cigarettes in all places where smoking of cigarettes is banned, and 16 additional states currently prohibit the use of electronic cigarettes in some specified places; and

WHEREAS, 438 cities, towns and counties nationwide regulate the use of electronic cigarettes, and 75 of those local governments are in California; and

WHEREAS, according to a non-exhaustive list compiled by San Mateo County health officials, there are at least 90 other public entities and private organizations nationwide that restrict the use of electronic cigarettes in the same manner as they restrict the smoking of traditional tobacco products; and

WHEREAS, a recent survey conducted by Harvard University showed that 65% of Americans, regardless of ethnicity, race, income or political affiliation, believe that electronic cigarettes are harmful, 69% support bans on electronic cigarette use at indoor workplaces, restaurants and businesses frequented by the public, 94% favor basic regulations like warning labels, and 56% believe that electronic cigarettes make teens more likely to smoke in the future; and

WHEREAS, secondhand marijuana smoke has been identified as a health hazard, as evidenced by the following:

- The California EPA included marijuana smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer; and
- According to a 2009 California EPA study, marijuana smoke contains at least 33 known carcinogens and is associated with cancers of the lung, head and neck, bladder, brain, and testes; and

- Based on the similar chemical composition of marijuana secondhand smoke and tobacco secondhand smoke, the well-established heart attack risk caused by exposure to tobacco secondhand smoke, and research demonstrating the negative effects of marijuana secondhand smoke on cardiovascular functions, a 2015 UCSF Division of Cardiology & Cardiovascular Research Institute report concluded that marijuana secondhand smoke and tobacco secondhand smoke likely have similar harmful effects on public health; and

WHEREAS, the American Society of Heating, Refrigerating, and Air Conditioning Engineers (“ASHRAE”) recommends that multi-unit housing be free from environmental tobacco smoke, marijuana smoke, and electronic smoking devices’ aerosol; and

WHEREAS, a 2011 pilot air quality study in Los Angeles County reported that “tobacco smoke particles move from unit to unit [in multi-unit residential buildings] through cracks in fixtures, electrical outlets, pipes, vents, and baseboards, as well as through ventilation systems and windows,” and Neil Klepeis, the scientist who conducted the study, estimates that “as much as 30 to 50 percent of the air in a residential building may come from other units, regardless of whether the buildings are new or old,” and that “[t]obacco smoke particles in units of non-smokers can reach significant levels equal to and exceeding those of a smoky bar or casino”; and

WHEREAS, the United States Department of Housing and Urban Development (“HUD”) urges owners and management agents of HUD-assisted housing to implement 100% smoke-free housing policies in multi-family housing to reduce the exposure of residents to secondhand smoke; and

WHEREAS, there is no Constitutional right to smoke; and

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

WHEREAS, at least one court in California has held a homeowner association liable for damages for failing to adopt smoking policies to prevent cigarette smoke from a condominium resident’s patio from entering another resident’s unit; and

WHEREAS, California law prohibits smoking in virtually all indoor places of employment reflecting the state policy to protect against the dangers of exposure to secondhand smoke; and

WHEREAS, California law declares that anything that 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

WHEREAS, in December 2015, the Council enacted Chapter 8.45 of the Brisbane Municipal Code which prohibits smoking, including the use of electronic cigarettes, in certain public places and businesses patronized by the public, and imposes limited restrictions on the sale and distribution of tobacco products, including electronic cigarette products; and

WHEREAS, in December 2015, the Council considered an ordinance that would prohibit smoking in multi-family residential units and the common areas thereof but requested that an extensive education and outreach effort be conducted before further consideration of such an ordinance; and

WHEREAS, an education and outreach program was conducted in the first six months of 2016, including creating educational flyers setting forth the date, time and locations of educational sessions, distributing educational flyers on City sponsored media platforms, distributing educational flyers through channels tied to the San Mateo County Health Systems, posting educational flyers impacted by the proposed ordinance, scheduling and hosting numerous educational sessions for residents at various locations throughout the community, including Viewpoint at the Ridge and Altamar on the Ridge; and

WHEREAS, there are other types of local regulations in Brisbane that restrict individuals from engaging in certain activities at their residences even though the same activity may be permissible at other locations within the City, including, for example, noise level regulations, fire regulations and limitations on running certain types of businesses from a residence; and

WHEREAS, this ordinance is adopted (1) to protect the public health, safety, and welfare of lawful occupants of multi-unit residences by discouraging the inherently dangerous behavior of smoking around non-smokers and decreasing the nonconsensual exposure of secondhand smoke and secondhand byproducts of electronic smoking devices to the public in and around their homes; (2) to protect children from inhaling secondhand smoke and secondhand byproducts of electronic smoking devices and from choking or ingesting butts or other toxic tobacco or electronic cigarette litter where children live and play; and (3) to strike a reasonable balance between the needs of persons who smoke and the needs of children and nonsmokers

to breathe smoke-free air, and to recognize that the need to breathe smoke-free air has priority; and

WHEREAS, this ordinance is exempt from the requirements of the California Environmental Quality Act (“CEQA”) pursuant to the CEQA Guidelines, as it is not a “project” as it has no potential to result in a direct or reasonably foreseeable indirect physical change to the environment. (14 Cal. Code Regs. § 15378(a)). Further, the ordinance is exempt from CEQA as there is no possibility that the ordinance or its implementation would have a significant negative effect on the environment. (14 Cal. Code Regs. § 15061(b)(3)). The ordinance is also categorically exempt because it is an action taken by a regulatory agency to assume the maintenance, restoration, enhancement or protection of the environment. (14 Cal. Code Regs. § 15308). The Director of Community Development shall cause a Notice of Exemption to be filed as authorized by CEQA and the CEQA guidelines.

THE CITY COUNCIL OF BRISBANE HEREBY ORDAINS AS FOLLOWS:

SECTION 1: Chapter 8.46 is enacted and added to Title 8 of the Municipal Code as follows:

CHAPTER 8.46 SMOKING IN MULTI-UNIT RESIDENCES

Section 8.46.010. - Application of Chapter; Declaration of Nuisance.

- (a) The provisions of this Chapter shall apply to all multi-unit residences within the city limits and to all multi-unit residences owned or leased by the city, wherever located.
- (b) Smoke produced in violation of this Chapter or state law is a nuisance, and the uninvited presence of such smoke on property is a nuisance and a trespass.

Section 8.46.020. - Definitions.

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

- (a) “Common area” means every enclosed or unenclosed area of a multi-unit residence accessible and usable by residents of different units including, but not limited to, halls and paths, lobbies, courtyards, elevators and stairs, community rooms, playground areas, gym facilities, swimming pool areas, parking garages and parking lots, shared restrooms, shared laundry rooms, shared cooking areas, and shared eating areas.

- (b) "Common interest development" means a development as defined in California Civil Code Section 4100 *et seq.* or successor statute, as said provisions may be amended or succeeded, which includes a "condominium project," a "community apartment project," a "stock cooperative," and a "planned development" and also includes a townhouse.
- (c) "Enclosed" means closed in by a roof and walls on all sides with appropriate openings for ingress and egress, windows and ventilation.
- (d) "Existing unit" means any unit that is not a new unit, including any associated exclusive-use enclosed or unenclosed areas.
- (e) "Landlord" means any person who owns property let for residential use, any person who lets residential property, and any person who manages such property, except that "landlord" does not include a master tenant who sublets a unit as long as the master tenant sublets only a single unit of a multi-unit residence.
- (f) "Multi-unit residence" means, except as specifically excluded below, any residential property containing two or more units with one or more shared or abutting walls, floors, ceilings or shared ventilation systems including, but not limited to, a common interest development, condominium, townhouse, duplex, triplex, and apartment or other rental complex. A "multi-unit residence" does not include any of the following excluded types of residential properties:
 - 1) Property owned by the state or federal government;
 - 2) A hotel or motel that meets the requirements set forth in California Civil Code section 1940 (b)(2);
 - 3) A residential care facility or assisted living facility governed by federal or state community care licensing regulations;
 - 4) A detached, single-family residence; and/or
 - 5) A detached, single-family home with a detached or attached in-law or second unit when permitted pursuant to Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the city adopted pursuant to those sections.
- (g) "New unit" means a unit that is issued a certificate of occupancy after the effective date of this ordinance and also means a unit that is let for residential use for the first time after the effective date of this ordinance.

- (h) "Nonsmoking area" means any enclosed area or unenclosed area of a multi-unit residence in which smoking is prohibited by: (1) this Chapter or other law; (2) by binding agreement relating to the ownership, occupancy, or use of real property; or (3) by designation of a person with legal control over the area.
- (i) "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, including government agencies.
- (j) "Rental" complex means a property for which 50 percent or more of units are let by or on behalf of the same landlord.
- (k) "Smoke" (noun) means any vapors, gases, particles or other by-products released as a result of combustion or electrical ignition, when the apparent or usual purpose of the combustion or electrical ignition is human inhalation of the byproducts, except when the combusting or igniting material both contains no tobacco or nicotine and the usual purpose of inhalation is solely olfactory such as with the burning of incense. Smoke does not include combustion of substances regulated by the United States Food & Drug Administration and used for medical or therapeutic purposes. Smoke specifically includes but is not limited to gases, particles, vapors or other by-products released by electronic cigarettes, tobacco cigarettes, herbal cigarettes, marijuana cigarettes and any other type of cigarette, pipe or other implement for the purpose of inhalation of vapors, gases, particles or other by-products released as a result of combustion or ignition.
- (l) "Smoking" or "to smoke" (verb) means possessing a lighted or ignited tobacco or nicotine product or paraphernalia; or engaging in an act that generates smoke (including, but not limited to, possessing a lighted or ignited pipe, hookah pipe, cigar, or cigarette of any kind including but not limited to an electronic cigarette); or lighting or igniting a pipe, a hookah pipe, a cigar, or a cigarette of any kind including but not limited to an electronic cigarette.
- (m) "Tobacco or Nicotine Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco; and any electronic cigarette or other electronic device used to generate smoke; and 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, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

- (n) "Unenclosed" means not enclosed.
- (o) "Unit" means a personal dwelling space for one or more persons at a multi-unit residence, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use enclosed or unenclosed area, such as, for example, a private balcony, porch, deck, or patio.

Section 8.46.030. - Smoking prohibited in units and common areas except designated smoking areas.

- (a) Smoking is prohibited in all units, all unenclosed and enclosed common areas, and all other areas of a multi-unit residence.
- (b) Notwithstanding subsection (a), a person with legal control over a common area, or authorized representative of such person, may designate a portion of the common area as a designated smoking area provided that at all times the designated smoking area complies with subsection (c) below.
- (c) A designated smoking area:
 - 1) Shall be an unenclosed and clearly delineated area, as described in this subsection (c);
 - 2) Shall be located at least 30 feet in any direction from any operable doorway, window, opening or other vent into an enclosed area that is located at the multi-unit residence;
 - 3) Shall have a clearly marked perimeter and be identified by conspicuous signs;
 - 4) Shall have receptacles designed for and primarily used for disposal of tobacco waste and shall be maintained free of tobacco related litter including but not limited to cigarette butts;
 - 5) Shall not include, and shall be at least 30 feet in any direction from the following areas at the multi-unit residence: (a) areas primarily used by children; and (b) areas with improvements that facilitate physical activity including playgrounds and swimming pools.
- (d) No person with legal control over a common or other area in which smoking is prohibited by this Chapter 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 the area. Such person with legal control over a

common or other area in which smoking is prohibited by this Chapter or other law shall maintain such area free of tobacco litter or waste.

Section 8.46.040. - Smoking prohibited in new and existing units and common areas of multi-unit residences.

Beginning six months after the effective date of this ordinance, smoking is prohibited, and no person shall smoke in any existing unit, in any common area of a multi-unit residence or in any unit created after the effective date of this ordinance, except in a designated smoking area as provided herein.

Section 8.46.050. - Additional smoking-related prohibitions related to multi-unit residences.

- (a) No person shall smoke in any nonsmoking area.
- (b) No person with legal control over any nonsmoking area, or authorized representative of such person, shall knowingly permit smoking in any nonsmoking area that is under the person's control. The person with legal control of the nonsmoking areas, or authorized representative of such person, shall keep the area free of any tobacco litter or waste.
- (c) No person shall intimidate or harass any person who seeks compliance with this Chapter. Moreover, no person shall intentionally or recklessly expose another person to smoke in response to that person's effort to achieve compliance with this Chapter. Violation of this subsection (c) shall constitute a misdemeanor.
- (d) Causing, permitting, aiding, or abetting a violation of any provision of this Chapter shall also constitute a violation of this Chapter.

Section 8.46.060. - Required signage at multi-unit residences.

- (a) "No smoking" signs 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 at each of the following areas where smoking is prohibited by this Chapter:
 - 1) On the outside of each enclosed building of a multi-unit residence but only if the building contains six or more units;
 - 2) At all enclosed common areas; and

- 3) At all unenclosed common areas with improvements that facilitate physical activity including playgrounds and swimming pools.
- (b) No signs are required by this Chapter in any unit of a multi-unit residence.
 - (c) The signs required by this Chapter shall be maintained by the person or persons with legal control over the common areas or the authorized representatives of such person.
 - (d) The absence of any sign required by this Chapter shall not be a defense to a violation of any provision of this Chapter.

Section 8.46.070. - Required and implied terms in a lease and a purchase and sale agreement.

- (a) Every lease or other rental agreement for the occupancy of a new unit or existing unit in a multi-unit residence entered into, renewed, or continued month-to-month after the effective date of this ordinance shall include the following:
 - 1) A provision stating in substance that it is a material breach of the lease/rental agreement for the tenant, or any other person subject to the control of the tenant or present by invitation or permission of the tenant, to (i) smoke 6 months or more after the effective date of this ordinance in any existing unit or in any common area of the property other than a designated smoking area, (ii) smoke in a new unit or (iii) violate any law regulating smoking anywhere on the property.
 - 2) A clear description of all areas on the property where smoking is allowed or prohibited.
 - 3) A clause expressly conveying third-party beneficiary status to all tenants and lawful occupants of the multi-unit residence as to the smoking provisions of the agreement.
- (b) Every agreement for the purchase and sale of any multi-unit residence or any new or existing unit in a multi-unit residence entered into after the effective date of this ordinance shall include the following:
 - 1) A provision stating in substance that it is a material breach of the agreement for any resident of the multi-unit residence or unit, or any other person subject to the control of a resident or present by invitation or permission of a resident, to (i) smoke six months or more after the effective date of this ordinance in an existing unit or in any common area of the property other than a designated

smoking area unless the property has any existing units, (ii) smoke in a new unit, or (iii) violate any law regulating smoking anywhere on the property.

- 2) A clear description of all areas on the property where smoking is allowed or prohibited.
 - 3) A provision expressly conveying third-party beneficiary status to all property owners and lawful occupants of the multi-unit residence as to the smoking provisions of the agreement.
- (c) Whether or not a landlord, property manager, property owner or homeowners' association complies with the applicable provisions of subsections (a) and (b) of this Section 8.46.070, the provisions required by those subsections shall be implied and incorporated by law into every agreement to which those subsections apply and shall become effective as of the earliest possible date on which the landlord, property manager, property owner or homeowners' association could have made the insertions pursuant to subsection (a) or (b).
- (d) This Chapter shall not create liability in a landlord, property manager, property owner, or homeowners' association for a breach of any smoking provision in a lease or other rental agreement for the occupancy of a unit in a multi-unit residence, or in an agreement for the purchase and sale agreement of a multi-unit residence or any unit in a multi-unit residence if that person or entity has fully complied with the applicable provisions of subsections (a) and (b) of this section 8.46.070.
- (e) Failure to enforce any smoking provision required by this Chapter 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.

Section 8.46.080. - Medical marijuana exemption.

Notwithstanding any other provisions of this Chapter, smoking of marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* in any unit is not prohibited by this Chapter. Notwithstanding the foregoing, such use of marijuana may be prohibited or regulated by other provisions of this Code, state law, or federal law.

Section 8.46.090. - Penalties.

- (a) Infractions. Any person who violates any provision of this Chapter shall be guilty of an infraction, punishable as follows:
 - 1) A fine not exceeding \$100.00 for a first violation.
 - 2) A fine not exceeding \$200.00 for a second violation.
 - 3) A fine not exceeding \$500.00 for each additional violation within one year.
- (b) Misdemeanors. Any person who violates any provision of this Chapter in excess of three times within one year, shall be guilty of a misdemeanor. Any single violation of subsection 8.46.050(c) shall constitute a misdemeanor, as set forth in that subsection.
- (c) Each day that a violation of this Chapter continues shall constitute a separate violation of this Chapter.
- (d) The remedies provided for by this Chapter are not intended to preclude or otherwise limit any other remedy available by law or equity.

Section 8.46.100. - Interpretation.

- (a) The provisions of this Chapter are restrictive only. This Chapter establishes no new rights for a person who engages in smoking and shall in no way limit the application of Chapter 8.45 of this Code. 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. This Chapter is intended and shall be interpreted to be consistent with and at least as stringent as any state statute

prohibiting smoking in any unit, common area or other area of a new or existing multi-unit residence, or any other place.

- (b) If any provision of this Chapter or the application thereof is held to be preempted, unconstitutional or otherwise invalid by a court of competent jurisdiction, such ruling shall not affect any other provision of this Chapter that is not specifically included in such ruling or that can be given effect without the preempted, unconstitutional, or invalid provision or application; and to this end, the provisions of this Chapter are declared severable.

SECTION 2. This Ordinance shall be in full force and effect thirty days after its passage and adoption. As set forth in Section 8.46.040 above, the prohibition on smoking in existing units and in common areas of multi-unit residences shall be operational six months after the effective date of this Ordinance.

The above and foregoing Ordinance was regularly introduced and after the waiting time required by law, was thereafter passed and adopted at a regular meeting of the City Council of the City of Brisbane held on the _____ day of _____, 2016, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

Cliff Lentz, Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

Michael Roush, City Attorney