



Regulating Tobacco Use Outdoors

The Tobacco Control Legal Consortium has created the Tips & Tools series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.¹ For more details about these policy considerations, please contact the Consortium.

Smoke-free Outdoor Air

Over the last decade, as evidence of the dangers of secondhand smoke has mounted, many communities have passed tobacco-free laws or regulations that cover outdoor areas such as parks, recreational facilities, beaches, outdoor workplaces, restaurant and bar patios, transit waiting areas, and public events such as county fairs and farmers' markets. Often these laws or regulations are extensions of, or amendments to, indoor smoke-free policies. Also, a growing number of hospital and school administrators and other employers are adopting tobacco-free campus policies, which extend to outside grounds such as parking lots, and any property owned, leased, rented or controlled by the employer.² This brief guide provides pointers for communities and policy makers to consider when drafting and implementing tobacco-free outdoor policies.



Policy Benefits

Public Health Impact. Exposure to second-hand smoke is linked to a wide range of serious and life threatening health problems including heart disease, cancer, asthma and other respiratory problems.³ Children exposed to second-hand smoke face increased risk of asthma, sudden infant death syndrome (SIDS), acute respiratory infections and ear problems. While most scientific evidence relates to indoor exposure, several recent studies have found that secondhand smoke exposure levels can be significant outdoors, particularly when smokers are in close proximity to others.⁴

In addition to preventing secondhand smoke exposure, outdoor tobacco-free laws help smokers who are trying to quit, by eliminating the sight and smell of tobacco smoke. Also, as with all tobacco-free policies, these measures send a message to children and youth that tobacco use is not an acceptable behavior or a norm in the community.

Environmental Impact. Discarded cigarette butts are a nonbiodegradable form of litter that can take decades to break down. Several trillion discarded cigarette butts litter sidewalks, beaches and other outdoor areas each year and are the single most collected item in international beach cleanups.⁵ Cigarette and other tobacco product litter is unattractive, expensive to clean up, and an environmental blight, harmful to waterways and wildlife. This waste can also affect the health of humans when, for example, children pick up and consume used cigarette butts and when the chemicals produced from wet cigarette butts enter storm drains, groundwater, recreational bodies of water, and other environments.⁶ Discarded cigarettes are also a significant cause of outdoor fires, accounting for hundreds of millions of dollars in annual costs in environmental damage, personal property losses, firefighting expenses and restorative efforts.⁷ Outdoor tobacco use policies can help reduce the amount of tobacco product waste, as well as maintenance and cleanup costs.

Policy Elements

Well-crafted tobacco-free outdoor policies are explicit about what they cover, and how communities will implement and enforce them. Here are a few elements found in such policies:

- **Timely findings and clear policy purpose.** Findings are brief statements of fact or statistics that outline the issue being addressed, support the need for the policy, and help clarify the policy goal. Often tobacco-free outdoor policies include current data documenting the health risks associated with exposure to secondhand tobacco smoke, as well as studies measuring exposure to smoke in outdoor areas. Statistics illustrating the impact of tobacco product waste on a local community would also support the need for regulations on outdoor smoking and tobacco use.
- **Clear definitions and concise language.** Avoid confusion about what constitutes an outdoor or indoor (enclosed) space by clearly defining the space you want to regulate. Some policies, for example, prohibit smoking outdoors within a reasonable distance (typically, 15 to 20 feet) from an entrance, an exit, or a vent into any enclosed smoke-free area or any unenclosed area where smoking is prohibited. Other policies define outdoor space by indicating that the policy reaches all property within certain boundaries, or all property in any way controlled by the organization adopting the policy. Depending on the reach of a particular policy, it might also be helpful to define indoor spaces. Be both explicit and practical, and be sure to include any exemptions or exceptions to this policy.
- **Robust enforcement options.** Enforcing outdoor tobacco-free policies can be challenging unless clear procedures are established, along with a reasonable penalty and appeal process. Effective enforcement of these policies often includes coordination among different enforcement agencies and consistent procedures throughout a community. The penalties section of the policy should clearly identify how persons can be found in violation of the policy, and the penalties or fines for first, second and additional violations.
- **Well-planned implementation process.** Most outdoor policies are self-enforcing, which means they depend upon the cooperation of the public – generally those who frequent the areas. Since most people will refrain from smoking if they know a tobacco-free policy is in

place, the best way to enhance enforcement is to educate the public and local businesses about the policy early and often in the implementation process. Greater community compliance will be achieved if the policy is easy to understand, the boundaries and areas covered under the policy are clearly identified, and active steps are taken to communicate its impact to all affected groups.

Establish a process for publicizing the policy and educating the community and affected business owners, as well as procedures for receiving, tracking and following up on complaints. Identify other implementation requirements, such as posting “Tobacco-Free” signs and removing ash cans and ash trays in the tobacco-free areas. Make sure you set a realistic date for the policy to take effect.



Also, be sure to consider the practical effects an outdoor policy might have on neighboring properties and public places. For example, be prepared to address problems that might arise if smokers congregate or litter on nearby private properties or heavily-traveled public sidewalks or streets.

Potential Legal Challenges

Although outdoor tobacco-free policies have proliferated in recent years, only a few of them have been legally challenged. In most cases, courts have upheld local laws prohibiting smoking in outdoor areas on the grounds that such laws (1) are within the authority of local governments to protect public health, safety and welfare; and (2) are not preempted by statewide smoke-free laws, which typically regulate smoking in enclosed or indoor areas only and address outdoor smoking minimally or not at all.⁸ In a few cases, however, these challenges have been successful.

In 2013, for example, the New York Supreme Court struck down smoke-free restrictions on outdoor smoking at New York state parks, including beaches and all nine state parks within New York City.⁹ Although more than 200 municipalities in New York State have passed regulations restricting tobacco use in parks, playgrounds, beaches, pools, athletic areas, pavilions and other outdoor recreational areas,¹⁰ the court ruled that the state agency that created the state parks law exceeded the authority granted to it by state law.¹¹

Also, in 2012, a Florida district court judge¹² struck down a local ordinance prohibiting the use of tobacco products in public parks on the ground that the ordinance was preempted by the Florida Clean Indoor Air Act.¹³ The court’s decision appeared to be heavily influenced by previous interpretations of Florida’s statewide smoke-free law as preempting outdoor smoking regulation.¹⁴

Finally, in 2012, the Oklahoma Attorney General’s Office issued an opinion concluding that the state’s smoke-free law limits municipal authority to enact laws prohibiting smoking in outdoor areas of municipally-owned or -operated properties, including public parks.¹⁵ Oklahoma’s smoke-free law contains a preemption clause indicating that the state legislature “intends to preempt any other regulation promulgated to control smoking,” and cities and towns may pass and enforce laws regulating smoking only if their provisions are “the same as” and “not more stringent” than those of the Act.¹⁶ The Oklahoma Attorney General interpreted this language to

mean that any municipal ordinance regulating smoking that contains additional requirements, conditions, or prohibitions is in direct conflict with, and preempted by, state law. Attorney generals' opinions, which are written interpretations of a state's law from its chief legal officer, are typically given weight by the courts in that particular state, and although they may be persuasive, they are not legally binding.

Select Legislation and Policies

Below are examples of smoke-free and tobacco-free policies in different outdoor areas around the U.S., as well as model policies. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Policy Type	City/Organization	Name	Notes
Outdoor Places of Employment & Public Places	Americans for Nonsmokers' Rights (Model Ordinance)	Prohibiting Smoking in Outdoor Places of Employment and Public Places	Includes parks, playgrounds, beaches, outdoor dining, outdoor places of employment, transit stops and sports arenas.
	Colorado (Model Ordinance)	Smoke-Free Workplaces and Public Places	Includes transit stops and sports arenas.
	Iowa	Iowa's Smoke-free Air Act	Includes outdoor dining, transit stops and sports arenas.
	Ann Arbor, Michigan	Smoke-free Outdoor Public Places	Includes parks and transit stops
Smoke-free Parks and Historic Sites	Maine	An Act to Protect Maine's State Parks and Historic Sites	Includes playgrounds, beaches, snack bars and picnic shelters.
Outdoor Dining	Philadelphia, Pennsylvania	Bill No. 050063-A	Includes sidewalk cafes, outdoor decks, patios and similar outdoor services areas
Outdoor Recreation Facilities / Parks	Tobacco Free Youth Recreation (Model Policy)	City-Owned Outdoor Recreational Facilities	
	Honolulu, Hawaii	City and County Smoking Regulation (Art. 21 Secs. 21.2(m), 21.2(n))	Includes parks, beaches and transit stops
	Albert Lea, Minnesota	Park & Recreation Department Tobacco	

		Free Policy	
	Arlington County, Virginia	Smoke-free Parks Initiative	
Smoke-free Beaches	Solana Beach, California	Ordinance No. 316 - Title 11, § 11.12.020(EE)	Includes parks and beaches
Fairgrounds	Tobacco Free Youth Recreation (Model Policy)	Tobacco-Free Fairgrounds	
Rodeos	Tobacco Free Youth Recreation (Model Policy)	Tobacco-Free Rodeo Grounds	
Outdoor Events	Tobacco Free Youth Recreation (Model Policy)	Tobacco-free Outdoor Events	

Other Helpful Resources

The Consortium's parent organization, the [Public Health Law Center](#), has a [webpage](#) containing information on smoke-free and tobacco-free regulation in outdoor areas. The Consortium also has Tips and Tools guides on adopting tobacco-free campus policies and [minimizing the public health and environmental effects of cigarette waste](#). [Americans for Nonsmokers' Rights](#) compiles [lists and maps](#) of smoke-free and tobacco-free outdoor areas throughout the U.S., including beaches, parks, zoos, sports stadiums, arenas and outdoor dining areas. [Tobacco-Free Youth Recreation](#) includes on its website many policy implementation resources that cover tobacco-free parks and recreation areas, fairgrounds, rodeos and outdoor events. For research and resources on eradicating cigarette waste, check out the following websites: Cigarette Butt Pollution Project at <http://www.cigwaste.org>; CigaretteLitter.Org at <http://www.cigarettelitter.org>; and Litter Butt at <http://www.litterbutt.com>.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7506 or publichealthlaw@wmitchell.edu with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

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Notes

¹ The information contained in this document is not intended to constitute or replace legal advice. We encourage anyone considering the implementation of any tobacco-related law or policy to seek out local legal counsel to obtain legal advice on these issues.

² For more information about regulating smoking and tobacco use on school campuses, see the Consortium’s website at <http://publichealthlawcenter.org/topics/tobacco-control/smoke-free-tobacco-free-places/schools>.

³ U.S DEP’T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: Report of the Surgeon General* (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/index.html>.

⁴ James Repace, *Benefits of Smoke-free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios and in Motor Vehicles*, 34 WM MITCHELL LAW REVIEW 4 (2008).

⁵ CigaretteLitter.org, *Cigarette Litter*, available at <http://www.cigarettelitter.org>.

⁶ See, e.g., Thomas E. Novotny et al., *Tobacco and Cigarette Butt Consumption in Humans and Animals*, 20 TOBACCO CONTROL i17, i18 (2011), available at http://tobaccocontrol.bmj.com/content/20/Suppl_1/i17.full.pdf+html; see also Thomas Novotny et al., *Cigarette Butts and the Case for an Environmental Policy on Hazardous Cigarette Waste*, 6 INT’L. J ENVTL. RES PUB. HEALTH 5 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2697937>.

⁷ See, e.g., National Fire Protection Association, *Smoking-Material Fire Problem* (2010)(statistical analysis of U.S. fires started by “smoking materials,” i.e., cigarettes, available at <http://www.nfpa.org/research/reports-and-statistics/fire-causes/smoking-materials>.

⁸ See, e.g., *Gallagher v. Clayton*, 699 F. 3d 1013 (8th Cir. 2012) (upholding the City of Clayton’s ordinance prohibiting smoking on any city-owned or -leased property, including buildings, grounds, parks and playgrounds, which a city resident had challenged on constitutional grounds, asserting that “the health threat of secondhand smoke from outdoor tobacco use is *de minimus*,” and that the city lacked a sufficient rationale for prohibiting it), available at <http://media.ca8.uscourts.gov/opndir/12/11/113880P.pdf>.

⁹ NYC CLASH Inc. v. New York State Office of Parks, Recreation & Historic Preservation, 2218/2013, N.Y.S. (2013), available at <http://www.tobaccocontrollaws.org/litigation/decisions/us-20131008-nyc-clash-inc.-v.-new-york-sta>.

¹⁰ Ashley Hupfl, *Judge Overturns Smoking Ban in N.Y. State Parks*, USA TODAY (Oct. 11, 2013), available at <http://www.usatoday.com/story/news/nation/2013/10/11/new-york-state-park-smoking-ban/2967991>.

¹¹ NYC CLASH v. New York State, *supra* note 9.

¹² *City of Sarasota v. Bonilla*, Case No. 2012 MO 12197 NC, Sarasota County Court, 12th Judicial Circuit, Fla. (2012).

¹³ FLA. STAT § 386.209.

¹⁴ In 2005, the Florida Attorney General’s Office interpreted the law’s preemption clause to prevent cities or counties from passing local ordinances regulating smoking in public parks. Fl. Att’y Gen. Op. No. 2005-63 (Nov. 21, 2005), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/876AC6F6B95DBF69852570C00075B510>. The judge in the Sarasota case acknowledged that there was no case law directly on point and that opinions rendered by the Florida Attorney General have no binding precedential value on the courts. But the judge said it found the Opinion’s reasoning to be “sound” and was persuaded by its conclusion that the legislature intended that the state preempt the regulation of all smoking, indoors and outdoors. Also, in 2013, the City Council in Gulfport, Florida voted unanimously to overturn its smoke-free beach ordinance, enacted in November 2011, based on the Sarasota judge’s 2012 ruling.

¹⁵ Ok. Att’y Gen. Op. No. 2013-2 (Feb. 5, 2013), *available at* <http://printing.ou.edu/FlipBooks/2013-Attorney-General/index.html#/30>.

¹⁶ OKLA. STAT. tit. 63 § 1-1527.